TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 130.

OLIVER O. FORSYTH, ADMINISTRATOR OF THE ESTATE OF JACOB FORSYTH, DECEASED, PLAINTIFF IN ERROR,

vs.

HENRY F. T. VEHMEYER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED JANUARY 2, 1899.

(17,243.)

(17,243.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 180.

OLIVER O. FORSYTH, ADMINISTRATOR OF THE ESTATE OF JACOB FORSYTH, DECEASED, PLAINTIFF IN ERROR,

vs.

HENRY F. T. VEHMEYER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

INDEX.

	Original.	Print.
Assignment of errors	*a*	1
Writ of error	*c*	1
Clerk's certificate as to copy of writ of error	*e*	2
Citation and service	*f*	2
Clerk's certificate as to copy of citation	*h*	3
Clerk's return and certificate to transcript	*i*	4
Caption	1	4
Transcript from superior court of Cook county	2	4
Caption	2	5
Præcipe for summons	3	5
Summons	4	6
Sheriff's return	5	6
Declaration	5	6
Pleas	6	6
Demurrer and replication to pleas	9	8
Order on demurrer, &c	12	10
Demurrer to replication	13	10
Order as to pleadings	15	11
Rejoinder to amended replication	16	12

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MAY 9, 1899.

	Original.	Print.
Finding by the court	18	13
Motion for new trial submitted	19	13
Judgment	19	13
Allowance of appeal to appellate court	20	13
Order to replace case on dockets	20	14
Order granting leave to file amended declaration, &c	21	14
Amended declaration	21	14
Demurrer to amended delaration	23	15
Order as to pleadings	24	15
Amended replication	25	16
Order as to rejoinder	26	16
Order granting leave to file additional plea	26	16
Additional plea	27	17
Demurrer to additional plea	31	19
Order sustaining demurrer	33	20
Order substituting attorneys for defendant	33	20
Judgment	34	20
Order extending time to file bill of exceptions	35	21
Stipulation as to bill of exceptions	36	21
Bill of exceptions	38	22
Testimony of James Frake	39	22
Testimony of R. R. Stevens	57	33
Exhibit A—Page from judgment docket	67	39
Testimony of James Frake (recalled)	73	43
Motion for finding for defendant	75	44
Testimony of Jacob Forsythe	78	45
Defendant's Exhibit 1—Letter, Vehmeyer to Forsythe, April 3, 1869	92	48
2—Statement of account and letter from Vehmeyer to Forsythe, May 4, 1869	95	50
3—Discharge in bankruptcy	103	55
4—Stipulation as to testimony of Robert C. Forsythe	110	58
Testimony of Wm. Hansbrough	122	66
John Marshall	126	68
S. J. Harmon	130	70
Marshall Waite	133	72
Exhibit 5—Page from judgment docket	135	74
Defendant rests	139	76
Testimony of James Frake (in rebuttal)	139	77
M. W. Robinson	143	79
Defendant's propositions of law	144	80
Finding of the court	146	81
Motion for new trial	147	82
Judge's certificate to bill of exceptions	149	83
Appeal bond	151	83
Clerk's certificate to transcript	152	84
Transcript from appellate court	153	85
Assignment of errors	153	85
Clerk's certificate	154	85
Orders granting time to file briefs	155	86
Order taking cause under advisement	156	86

	Original	Print.
Judgment	156	86
Order allowing appeal	156	87
Order approving appeal bond	157	87
Appeal bond	157	87
Clerk's certificate	158	88
Assignment of errors	159	89
Order taking cause under advisement	160	90
Judgment	161	90
Opinion	162	91
Clerk's certificate	170	96
Order denying rehearing	171	96
Petition for writ of error	172	97
Allowance of writ of error	172	97
Bond on writ of error	173	98

a UNITED STATES OF AMERICA, *ss:*

In the Supreme Court.

JACOB FORSYTH, Plaintiff in Error,
vs.
HENRY F. T. VEHMEYER, Defendant in Error. } Error to the Supreme Court of Illinois.

Jacob Forsyth, plaintiff in error, by Edward Roby, his counsel, complains to the Supreme Court of the United States of America, and says that in the record and proceedings in the said supreme court of Illinois in the case lately pending therein wherein he, said Jacob Forsyth, was appellant and said Henry F. T. Vehmeyer was appellee, upon an appeal from a judgment rendered in the appellate court in and for the first district of said State, there is manifest error in this, to wit:

The said supreme court of Illinois ought to have reversed the judgment of the said appellate court and the judgment of the superior court of Cook county, in said State, and ought not to have affirmed the said judgments or either of them.

The judgment of the superior court of Cook county, Illinois, in said record shown, was and is erroneous and ought to be reversed,

because the discharge in bankruptcy therein pleaded and
b proved was and is a bar to the action, and judgment should have been for the defendant.

And because the superior court of Cook county excluded evidence offered by the defendant in the case in that court which ought to have been admitted, and admitted evidence offered by the plaintiff in that court which ought to have been excluded.

Wherefore and for divers other manifest errors appearing upon the face of said record the said Forsyth, plaintiff in error herein, prays that the said judgment of the supreme court of Illinois may be reversed, and that said judgment of the appellate court of Illinois in said record shown may be reversed, and that the said judgment of the superior court of Cook county in said record shown may be reversed, and that said plaintiff in error may have such other and further or different relief and order in the premises as may be meet.

EDWARD ROBY,
Counsel for said Plaintiff in Error.

c UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you or some of you, between Jacob Forsyth, appellant, and Henry F. T. Vehmeyer, appellee, a manifest error hath happened, to the great damage of the said Jacob Forsyth, appellant, as by his complaint

appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

The Seal of the Circuit Court of the United States for the South'n Dist. Ill.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the tenth day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES T. JONES,
Clerk of the Circuit Court of the United States for the Southern Dist. of Illinois.

Allowed by—
JOSEPH N. CARTER,
Chief Justice Supreme Court, State of Illinois.

d [Endorsed:] Supreme Court of the United States. Jacob Forsyth *vs.* Henry F. T. Vehmeyer. Writ of error. Filed Dec. 10, 1898. C. Mamer, clerk of supreme court. Copy deposited for the defendant in error in the clerk's office.

e In the Supreme Court of Illinois.

JACOB FORSYTH
vs.
HENRY F. T. VEHMEYER.

I, Christopher Mamer, clerk of said supreme court, do hereby certify that on the tenth day of December, in the year of our Lord one thousand eight hundred and ninety-eight, a copy of the foregoing writ or error for the defendants in error was lodged in my office, at Springfield, Illinois.

Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.

Witness my hand and the seal of said court this twenty-seventh day of December, A. D. 1898.

CHRISTOPHER MAMER,
Clerk of Supreme Court.

[Ten-cent U. S. internal-revenue stamp, canceled 12, 27, '98. C. M.]

f UNITED STATES OF AMERICA, *ss:*

To Henry F. T. Vehmeyer, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's

office of the supreme court of the State of Illinois, wherein Jacob Forsyth is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph N. Carter, chief justice of said supreme court of Illinois, this tenth day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

JOSEPH N. CARTER,
Chief Justice of the Supreme Court of State of Illinois.

g [Endorsed:] Supreme Court of the United States. Jacob Forsyth, pl'ff in error, *vs.* Henry F. T. Vehmeyer, def't in error. Citation. I hereby admit service of this citation on me this 24th day of Dec., 1898. M. W. Robinson, attorney for def't in error.

On this 24th day of December, in the year of our Lord one thousand eight hundred and ninety-eight, personally appeared Edward Roby before me, the subscriber, a notary public in and for the county of Cook, in the State of Illinois, and makes oath that he delivered a true copy of the within citation to M. W. Robinson, Esq., in person, as appears by his admission of service on the back thereof, and that said Robinson was and is the attorney for Henry F. T. Vehmeyer in the suit herein named in the superior court of Cook county and the supreme court of Illinois.

EDWARD ROBY.

Sworn to and subscribed the 24th day of December, A. D. 1898.

[Seal of George A. Smith, Notary Public, Cook County, Ill.]

GEORGE A. SMITH,
Notary Public.

h In the Supreme Court of Illinois.

JACOB FORSYTH
vs.
HENRY F. T. VEHMEYER.

I, Christopher Mamer, clerk of said supreme court, do hereby certify that on the twenty-sixth day of December, in the year of our Lord one thousand eight hundred and ninety-eight, a copy of the foregoing citation was lodged in my office, at Springfield, Illinois.

Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.

Witness my hand and the seal of said court this twenty-seventh day of December, A. D. 1898.

CHRISTOPHER MAMER,
Clerk of Supreme Court.

[Ten-cent U. S. internal-revenue stamp, canceled 12, 27, '98. C. M.]

i In the Supreme Court of Illinois.

JACOB FORSYTH
vs.
HENRY F. T. VEHMEYER.

I, Christopher Mamer, clerk of the supreme court of Illinois elected for the northern grand division, and keeper of the records and files thereof, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from one (1) to one hundred and seventy-five (175), inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case which is above entitled and of the whole thereof, including a certified copy of the opinion of the court, as the same remain- of record and on file in my said office.

In testimony whereof I have hereunto set my hand and caused the seal of said supreme court of Illinois to be hereunto affiixed, at Springfield, this twenty seventh day of December, in the year of our Lord one thousand eight hundred and ninety eight.

Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.

CHRISTOPHER MAMER,
Clerk of Supreme Court.

[Ten-cent U. S. internal-revenue stamp, canceled 12, 27, '98. C. M.]

1 At a supreme court begun and held at Springfield, on Tuesday, the seventh day of June, in the year of our Lord one thousand eight hundred and ninety-eight, within and for the State of Illinois.

Present: Joseph N. Carter, chief justice; Alfred M. Craig, justice; Jacob W. Wilkin, justice; James H. Cartwright, justice; Benjamin D. Magruder, justice; Jesse J. Phillips, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Edward A. Baxter, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered that heretofore, to wit, on the sixth day of June, A. D. 1898, there was filed in the office of the clerk of said court a certain transcript of the record and proceedings of the superior court of Cook county, Illinois, and of the appellate court of Illinois, first district; which said transcripts *are* in the words and figures following, viz:

2 UNITED STATES OF AMERICA:

STATE OF ILLINOIS, } ss:
County of Cook, }

Pleas before the Honorable Jonas Hutchinson, one of the judges of the superior court of Cook county, in the State of Illinois, holding a branch court of said court, at a regular term of said superior court of Cook county, begun and holden at the court-house, in the city of Chicago, in said county & State, on the first Monday, being the seventh day, of June, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the one hundred and twenty-first.

Present: The Honorable Jonas Hutchinson, judge of the superior court of Cook county; Charles S. Deneen, State's attorney; James Pease, sheriff of Cook county.

Attest: JOHN A. LINN, *Clerk.*

Be it remembered that heretofore, to wit, on February 24th, in the year of our Lord one thousand eight hundred and ninety-one, there was filed in the office of the clerk of the superior court of Cook county a certain præcipe for summons, which is in the words and figures as follows, to wit:

3 STATE OF ILLINOIS, } ss:
County of Cook, }

Superior Court of Cook County, April Term, A. D. 1891.

HENRY F. T. VEHMEYER, Plaintiff, } Debt.
vs.
JACOB FORSYTH, Defendant. } Damages, $2,000.

The clerk of said court will issue a summons in the above entitled cause to said defendant in a plea of debt, to the damage of said plaintiff in the sum of two thousand dollars, direct the same to the sheriff of Cook county to execute, and make it returnable to the April term of said court, A. D. 1891.

JAMES FRAKE,
Plaintiff's Attorney.

To Patrick McGrath, Esq., clerk.

Chicago, February 24, 1891.

4 And afterwards, to wit, on the same day and year last aforesaid, there issued out of the office of the clerk of said court the people's writ of summons; which said writ, with the sheriff's return endorsed, is in the words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

The People of the State of Illinois to the sheriff of said county, Greeting:

We command you that you summon Jacob Forsyth, if he shall be found in your county, personally to be and appear before the superior court of Cook county on the first day of the next term thereof, to be holden at the court-house in Chicago, in said county, on the first Monday of April next, to answer unto Henry F. T. Vehmeyer of a plea that he render to the said plaintiff two thousand dollars, which he owes to and unjustly detains from said plaintiff, to the damage of said plaintiff, as is said, in the sum of two thousand dollars; and have you then and there this writ, with an endorsement hereon in what manner you shall have executed the same.

Witness Patrick McGrath, clerk of our said court, and the seal thereof, at Chicago aforesaid, this 24th day of February,
5 A. D. 1891.

[SEAL.] PATRICK McGRATH, *Clerk.*

P'd .75.

Served this writ on the within-named defendant, Jacob Forsyth, by reading the same to him this 25th day of February, 1891.

JAMES H. GILBERT, *Sheriff,*
By WM. M. HENRY, *Deputy.*

And afterwards, to wit, on the same day and year last aforesaid, there was filed in the office of the clerk of said court a certain declaration in debt, which is in the words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

In the Superior Court of Cook County, to the March Term, 1891.

Henry F. T. Vehmeyer, plaintiff in this suit, by James Frake, his attorney, complains of Jacob Forsyth, defendant, in a plea of debt:

For that whereas the plaintiff, in the July term of said court, in the year 1871, to wit, on or about the 29th day of July, in
6 the same year, by the consideration and judgment of the said court, recovered against the defendant in a certain action upon the case the sum of eight hundred and thirty-three and $\frac{35}{100}$ dollars damages, and also the costs of the plaintiff in that behalf, taxed at, to wit, the sum of six and seventy-five hundredths dollars, whereof the defendant was convicted, as by the record thereof did fully appear, which record was destroyed by the great fire of October eight- and ninth, A. D. 1871, which said judgment still remains in full force, yet the defendant has not paid to the plaintiff the said sums of money so recovered by him as aforesaid, together amounting to, to wit, the sum of eight hundred and forty and $\frac{10}{100}$ dollars, or any part thereof, but refuses so to do, to the damage of

the plaintiff of two thousand dollars, and therefore he brings his suit, etc.

JAMES FRAKE,
Attorney for Plaintiff.

And afterwards, to wit, on April 8th, A. D. 1891, there was filed in the office of the clerk of said court a certain plea, which is in words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court of Cook County.

JACOB FORSYTH }
vs.
HENRY F. T. VEHMEYER. }

7 And the said defendant, by Goudy, Green & Goudy, his attorneys, comes and defends the wrong and injury when, &c., and *said* that he does not owe the said sum of money above demanded, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him, the said defendant; and of this he puts himself upon the count-y, &c.; and for a further plea in this behalf the said defendant says that there is not and never was any record of the supposed recovery in the said declaration mentioned remaining in the said superior court of Cook county, in manner and form as the said plaintiff hath in his above declaration alleged; and this the said defendant is ready to verify. Wherefor- he prays judgment if the plaintiff ought to have or maintain his aforesaid action against him.

And for a further plea in this behalf the said defendant says that the plaintiff ought not to have or maintain his aforesaid action against him, the said defendant, because he says that after the said supposed recovery of the said supposed judgment in the said declaration mentioned, and before the commencement of this suit, to wit, on the thirtieth day of December, 1880, the district court of the United States for the district of Indiana granted to the said defendant a certain discharge in these words and figures, to wit:

In the District Court of the United States for the District of Indiana.

In the Matter of JACOB FORSYTH, Bankrupt. 3292. Bankruptcy.

8 DECEMBER 30, 1880.

Whereas Jacob Forsyth has been duly adjudged a bankrupt under the act of Congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all requirements of law in that behalf:

It is therefore ordered by the c-urt that said Jacob Forsyth be for-

ever discharged from all debts and claims which by said act are made ap-rovable against his estate and which existed on the 30th day of August, 1878, on which day the petition for adjudication was filed by him, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy.

And this the said defendant is ready to verify. Wherefor- he prays judgment if the plaintiff ought to have or maintain his aforesaid action against him.

GOUDY, GREEN & GOUDY,
Defendant's Attorney-.

And afterwards, to wit, on December 18th, A. D. 1891, there was filed in the office of the clerk of said court a certain demurrer, which is in the words and figures as follows, to wit:

9 STATE OF ILLINOIS, } *ss:*
Cook County, }

In the Superior Court of Cook County.

HENRY F. T. VEHMEYER }
vs. } Debt.
JACOB FORSYTH. }

And the plaintiff, as to the plea of the defendant by him first above pleaded, says that the same and the matter- therein contained, in manner and form as the same are therein pleaded, are not sufficient in law to bar him, the plaintiff, from having his aforesaid action, and that he is not bound in law to answer the same; and this he is ready to verify.

Wherefore, for want of a sufficient plea in this behalf, the plaintiff prays judgment and his damages, etc., to be adjudged to him, etc.

And the plaintiff, as to the plea of the defendant by him secondly above pleaded, says that he, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having his aforesaid action, because he says that there is such record of said recovery remaining in the said superior court of Cook county, as he has above in his said declaration alleged; and this he prays may be inquired of by the country, etc.

Withdrawn.

10 And the plaintiff, as to the plea of the defendant by him thirdly above pleaded, says that he, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having his aforesaid action against the defendant, because he says that the judgment in said declaration mentioned is in respect to a debt or claim which is by the act in said plea mentioned excepted from the operation of a discharge in bankruptcy.

And this the plaintiff prays may be inquired of by the country, etc.

2. And for a further replication to the plea of the defendant by him thirdly above pleaded the plaintiff, by leave of the court first had and obtained, says *preclude non*, etc., because he says that the action

wherein the judgment mentioned in the plaintiff's declaration in this case was recovered against said defendant was brought by the plaintiff against the defendant in the said superior court of Cook county to recover damages claimed by the plaintiff in said action to have been sustained by said plaintiff by reason of alleged fraud practiced by the defendant upon said plaintiff, by which the plaintiff was induced to advance and pay to the defendant a large amount of money, to wit, about the sum of twelve hundred dollars, by the false and fraudulent representations of the defendant that he, the defendant, owned and had in his possession ready for delivery a large quantity, to wit, six hundred cords, of cord-wood in Lake county, in the State of Indiana; and that the said action and the right to recover therein were found- solely upon the said fraud of said defendant; and the plaintiff avers that issue was joined in that
11 action by the parties thereto upon the material allegations so made by said plaintiff therein in respect to said fraud, and that trial by a jury was had therein, and a verdict upon the issues so joined was rendered therein in favor of the plaintiff and against the defendant for said sum of eight hundred and thirty-three and $\frac{33}{100}$ dollars as the damages which had been sustained by said plaintiff by reason of said alleged fraud of the defendant; and the plaintiff avers that the judgment hereinabove set forth in the plaintiff's declaration was entered and rendered by said superior court of Cook county upon said verdict aforesaid, and was,— aforesaid, founded solely upon the fraud practiced by the defendant, as aforesaid, upon said plaintiff; and plaintiff avers that said judgment in his said declaration set forth is a debt or claim which is by the said act in defendant's third plea mentioned excepted from the operation of the discharge in bankruptcy which is by said defendant in his said third plea pleaded and set forth; and the plaintiff was not by virtue of his said alleged discharge in bankruptcy in said third plea pleaded discharged from the debt or claim of the judgment mentioned and set forth in plaintiff's declaration herein; and this the plaintiff is ready to verify.

3. And for a further replication to the plea of the defendant by him thirdly above pleaded the plaintiff, by leave of the court first had and obtained, says *preclude non*, etc., because he says
12 that there is not any record of the supposed discharge in bankruptcy granted to said defendant mentioned and set forth in the defendant's said third plea remaining in the said district court for the district of Indiana, in manner and form as the defendant has above in his said third plea alleged.

And the defendant prays — may be inquired of by the country, etc.

M. W. ROBINSON,
Plaintiff's Attorney.

And on the same day and year last aforesaid, being one of the days of the December term of the superior court, the following, among other, proceedings were had and entered of record in said court, to wit:

HENRY F. T. VEHMEYER
vs.
JACOB FORSYTH. } 131,807. Debt.

This cause coming on to be heard upon the demurrer to the defendant's first plea filed herein, and after arguments of counsel and due deliberation by the court, said demurrer is sustained and leave given to the plaintiff to file several replications to the defendant's third plea filed herein, and the defendant is hereby required to rejoin thereto within ten days from this date.

And afterwards, to wit, on February 10, A. D. 1892, there
13 was filed in the office of the clerk of said court a certain demurrer and similiter, which is in the words and figures as follows, to wit:

STATE OF ILLINOIS, } *ss:*
County of Cook,

In the Superior Court of Cook County.

JACOB FORSYTH
ads.
HENRY F. T. VEHMEYER. } Debt.

And the defendant, as to the said replication of the plaintiff to the said second plea of the defendant, says that the same and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and that he, the said defendant, is not bound by law to answer the same; and this the said defendant is ready to verify. Wherefor-, by reason of the insufficiency of the said replication in this behalf, the said defendant prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him, etc.

And the defendant, as to the first replication of the plaintiff to the said third plea of the defendant, says that the same and the
14 matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and that he, the said defendant, is not bound by law to answer the same; and this the said defendant is ready to verify. Wherefor-, by reason of the insufficiency of the said replication in this behalf, the said defendant prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him, etc.

And the defendant, as to the second replication of the plaintiff to the said third plea of the defendant, says that the same and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and that he, the said defendant, is not bound by law to answer the same; and this the said defendant is ready to verify. Wherefor-, by reason of the insufficiency of the said replication in this behalf, the said defendant prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him, etc. And the said defendant states and shows to the court here the following cause of demurrer in law to the said replication—that is to say, that the said plaintiff had not concluded his said replication with a verification, but, on the contrary thereof, hath concluded it by putting himself upon the country; and also for that the said replication is in other respects uncertain, informal, and insufficient, etc.

And the defendant, as to the said third replication of the plaintiff to the said third plea of the defendant, and which the plain-
15 tiff has prayed may be inquired of by the country, does the like.

GOUDY, GREEN & GOUDY,
Defendant's Attorneys.

And afterwards, to wit, on March 26th, A. D. 1892, being one of the days of the March term of the superior court, the following, among other, proceedings were had and entered of record in said court, to wit:

HENRY F. VEHMEYER
vs. } 131,807. Debt.
JACOB FORSYTH.

On motion of defendant's attorney, it is ordered that leave be, and is hereby, given the defendant to amend the third plea filed herein, and leave is given the plaintiff to withdraw the first replication thereto and amend the replication to the defendant's second plea and the second replication to the defendant's third plea filed in said cause, and leave is also given said defendant to withdraw *to* demurrer to said first and second replications, and is hereby required to rejoin to said amended replications within ten days from this date.

16 And afterwards, to wit, on April 6, A. D. 1892, there was filed in the office of the clerk of said court a certain rejoinder to amended replication, which is in the words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court of Cook County.

JACOB FORSYTH *ads.* HENRY F. T. VEHMEYER. } Debt.

And the defendant, as to the said replication of the plaintiff to the said second plea of the defendant, and which the plaintiff has prayed may be inquired of by the country, does the like.

And the defendant, as to the second replication of the plaintiff to the said third plea of the defendant, says that plaintiff ought not, by reason of anything in that replication alleged, to have his aforesaid action against him, the defendants, because he says that the action wherein the judgment mention- in the plaintiff's declaration in this case was recovered against said defendant was not
17 brought by the plaintiff against defendant in the said superior court of Cook county to recover damages claimed by the plaintiff in said action to have been sustained *he* said plaintiff by reason of the alleged fraud claimed to have been practiced by defendant upon said plaintiff, *has* in said replication alleged; and that the said action and the right to recover therein were not founded upon said alleged fraud of said defendant, or upon any alleged fraud whatever; and that issue was not joined in that action upon the material allegations so made by said plaintiff therein in respect to said fraud, and that trial by a jury was not had therein and a verdict upon the issues was not rendered therein in favor of the plaintiff and against the defendant for the sum of eight hundred and thirty-three and $\frac{3}{100}$ dollars as the damage which had been sustained by said plaintiff by reason of the said alleged fraud of the defendant, in manner and form as the plaintiff has in said replication alleged; and the defendant denies that the judgment set forth in the above replication was entered or rendered by said superior court of Cook county upon said verdict aforesaid, and denies that it was, as aforesaid, found solely upon fraud practiced by the defendant, as aforesaid, upon plaintiff; and plaintiff denies that said judgment in the said declaration of the plaintiff set forth *in* a debt or claim which is by the said act in this defendant's third plea mentioned excepted from the operation of the discharge in bankruptcy which is by this defendant in his said third plea pleaded and set
18 forth in manner and form as the plain- has in said replication alleged; and the defendant denies that he was not by virtue of his said alleged *dei*charge in bankruptcy in his said third plea pleaded discharged from the debt or claim or judgment mentioned and set forth in plaintiff's declaration herein in manner and form as the plaintiff in his said replication alleged; and of this the defendant puts himself upon the country, etc.

GOUDY, GREEN & GOUDY,
Defendant's Attorneys.

And afterwards, to wit, on January 16th, A. D. 1894, being one of the days of the January term of the superior court, the following, among other, proceedings were had and entered of record in said court, to wit:

HENRY F. T. VEHMEYER
vs.
JACOB FORSYTHE. } 131,807. Debt.

On the agreement of the parties to this suit, now here made in open court, this cause is submitted to the court for trial without a jury, and the court, now hereafter hearing all the evidence adduced, the arguments of counsel, and being fully advised in the premises, finds the issues for the plaintiff, and that there is now due and
19 owing from the defendant and to the plaintiff t-e sum of eight hundred and thirty-three dollars and thirty-five cents, and assesses the plaintiff's damages at the sum of eleven hundred and one dollars and sixty-five cents.

Whereupon the defendant submits herein his motion for a new trial in said cause.

And afterwards, to wit, on February 21, A. D. 1894, being one of the days of the February term of the superior —, the following, among other, proceedings were had and entered of record in said court, to wit:

HENRY F. T. VEHMEYER
vs.
JACOB FORSYTH. } 131,807. Debt.

This cause coming on to be heard upon the defendant's motion, heretofore entered herein, for a new trial in said cause, after arguments of counsel and due deliberation by the court, said motion is overruled and a new trial denied. Therefore it is considered by the court that the plaintiff do have and recover of and from the defendant his said debt of eight hundred and thirty-three dollars and thirty-five cents, also his said damage of eleven hundred and one dollars and sixty-five cents, in form as aforesaid by the court found due and assessed, together with his costs and charges in this behalf expended, and have execution therefor.

Debt.....	$833 35
Da's.....	1,101.65
Entire..	

20 Wherefore the defendant, having entered his exceptions herein, prays an appeal from the judgment of this court to the appellate court in and for the first district of Illinois, which is allowed on filing his appeal bond herein in the sum of three thousand dollars, to be approved by the court, together with his bill of exceptions, to be filed within ten days from this date.

"NOTE."—"Mandate not found among the files."

And afterwards, to wit, on January 2nd, 1895, being one of the days of the January term of the superior court, the following, among

other, proceedings were had and entered of record in said court, to wit:

HENRY F. T. VEHMEYER
vs.
JACOB FORSYTHE. } 131,807. Debt.

On motion of defendant's attorney, the plaintiff having been duly served with notice of said motion, it is ordered that this cause be replaced upon the several dockets of this court pursuant to the mandate filed.

21 And afterwards, to wit, on January 31, A. D. 1895, being one of the days of the January term of the superior court, the following, among other, proceedings were had and entered of record in said court, to wit:

HENRY F. T. VEHMEYER
vs.
JACOB FORSYTHE. } 131,807. Debt.

On motion of plaintiff's attorney, it is ordered that leave be, and is hereby, given the plaintiff to file an amended declaration herein instanter, and the defendant required to plead thereto within ten days from this date.

And on the same day and year last aforesaid there was filed in the office of the clerk of said court a certain amended declaration, which is in the words and figures as follows, to wit:

STATE OF ILLINOIS, } *ss*:
Cook County,

In the Superior Court of Cook County, to the March Term, 1891.

22 Henry F. T. Vehmeyer, plaintiff in this suit, by M. W. Robinson, his attorney (by this his amended declaration filed herein by leave of court), complains of Jacob Forsythe, defendant in a plea of debt—

For that whereas the plaintiff, in the July term of said court, in the year 1871, to wit, on or about the 29th day of July, in the same year, by the consideration and judgment of said court, recovered against the defendant in a certain action upon the case the sum of eight hundred and thirty-three and $\frac{35}{100}$ dollars damages, and also the costs of the plaintiff in that behalf, taxed at, to wit, the sum of six and seventy-five hundredths dollars; whereof the defendant was convicted, as by the record thereof which was remaining until the destruction of such record by fire in October, 1871, and did more fully appear; and which judgment still remains in full force.

And the plaintiff avers that the said record of said judgment was wholly destroyed by fire on, to wit, October 9th, 1871, at, to wit, the county aforesaid, and that said record is not and was not at the time of the commencement of this suit in existence.

Yet the defendant has not paid to the plaintiff the said sum of money so recovered by him, as aforesaid, together amounting to, to wit, the sum of eight hundred and forty and $\frac{10}{100}$ dollars, or any part thereof, but refuses to do so, and therefor- he brings his suit, etc.

By M. W. ROBINSON,
Attorney for Plaintiff.

23 And afterwards, to wit, on February 15th, A. D. 1895, there was filed in the office of the clerk of said court a certain demurrer to declaration:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court of Cook County.

JACOB FORSYTHE } Debt.
ads.
HENRY F. T. VEHMEYER. }

And the defendant, by F. W. Tourtellotte and F. J. Tourtellotte, his attorneys, comes and defends, etc., when, etc., and says that the said declaration and each count thereof and the matter- therein contained, in manner and form as the same are above set forth, are not sufficient in law for the plaintiff to maintain his aforesaid action, and that he, the defendant, is not bound by law to answer the same; and this he is ready to verify.

Wherefor- for want of a sufficient declaration in this behalf the defe-dant prays judgment and that the plaintiff may be barred from maintaining his aforesaid action, etc.

F. W. & F. J. TOURTELOTTE,
Attorneys for Defendant.

24 And afterwards, to wit, on February 20th, A. D. 1895, being one of the days of the February term of the superior court, the following, among other, proceedings were had and entered of record on said court, to wit:

HENRY F. T. VEHMEYER } 131,807. Debt.
vs.
JACOB FORSYTHE. }

On the agreement of the parties *of* this suit, now here made in open court, it is ordered that the demurrer to the plaintiff's amended declaration filed in said cause be, and it is hereby, withdrawn, and the defendant's second and third pleas heretofore filed to the plaintiff's original declaration to stand to said amended declaration, and leave given to the plaintiff to file an amended replication to said second plea instanter, and the defendant required to rejoin thereto within ten days from this date.

And on the same day and year last aforesaid there was filed in the office of the clerk of said court a certain amended first replication to 2nd plea, which is in the words and figures as follows, to wit:

25 STATE OF ILLINOIS, } ss:
Cook County, }

In the Superior Court of Cook County, to the March Term, A. D 1891.

HENRY F. T. VEHMEYER }
vs. } Debt.
JACOB FORSYTHE. }

Amended Replication.

And the plaintiff for replication to the plea of the defendant by him secondly above pleaded says *preclude non*, etc., because he says that there was prior to and until the time of the destruction thereof by fire, as in said declaration alleged, remaining in the said superior court of Cook county such record of said recovery in the said superior court of Cook county aforesaid, as he had above in his said declaration alleged, and that although said record was destroyed by fire, as he has above in his said declaration alleged, and the said record is not and was not at the time of the commencement of his said suit in existence, yet the said judgment was then and still remains in full force; and this he prays may be enquired of by the country, etc.

By M. W. ROBINSON,
Att'y for Plaintiff

26 And afterwards, to wit, on March 21st, A. D. 1895, being one of the days of the March term of the superior court, the following, among other, proceedings were had and entered of record in said court, to wit:

HENRY F. T. VEHMEYER }
vs. } 131,807. Debt.
JACOB FORSYTH. }

On the agreement of the parties to this suit, now here made in open court, it is ordered that defendant's rejoin-er to the plaintiff's original replication to the defendant's second plea filed in said cause stand as a rejoin-er to the amended replication to said plea.

And afterwards, to wit, on January 28th, 1896, A. D., being one of the days of the January term of the superior court, the following, among other, proceedings were had and entered of record in said court, to wit:

HENRY F. VEYMEYER }
vs. } 131,807. Debt.
JACOB FORSYTH. }

On motion of defendant's attorney, it is ordered that leave
27 be, and is hereby, given the defendant to file an additional plea herein instanter.

And afterwards, to wit, on the same day and year last aforesaid, there was filed in the office of the clerk of said — a certain additional plea, which is in the words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

In the Superior Court of Cook County.

JACOB FORSYTH
ads.
HENRY F. T. VEHMEYER.

And the said defendant, by Thomas J. Merrifield and Olds & Griffin, his attorneys, now comes and for a further plea in this behalf the said defendant says that he admits that at the July term of the said court, in the year 1871, to wit, on or about the 29th day of July, in the same year, by the consideration and judgment of said court the plaintiff recovered against the defendant in a certain action upon the case the sum of eight hundred and thirty-three and $\frac{35}{100}$ dollars damages, and also the costs of the plaintiff in that behalf, taxed at, to wit, the sum of six and seventy-five one hundredths dollars, whereof the defendant was convicted, as in said plaintiff's declaration alleged; but the said defendant says that the plaintiff ought not to have and maintain his said action against this defendant
28 for the reason that afterwards, to wit, in the year 1871, the said plaintiff caused to be issued and delivered to the sheriff of said Cook county, *of* Illinois, an execution on said judgment against the body of the said defendant and caused him, the said defendant, to be arrested and taken to custody and imprisoned by the sheriff of said county on said execution, and thereupon, in the year 1871, the said defendant filed and presented his written petition and application to the judge of the county court of Cook county, Illinois, asking that he be discharged from such arrest and imprisonment, and gave reasonable and proper notice to the plaintiff and his attorney and agent, at whose instance he was arrested and imprisoned, and to the sheriff who made said arrest; that at the time appointed in such notice the sheriff and officer having the said defendant in custody conveyed him before the judge of the county court of the said Cook county, Illinois.

That at the time and place set for hearing before the county court of said Cook county, Illinois, the said plaintiff and his attorney appeared and contested the discharge of the said defendant, and thereupon said cause was heard, and said court adjudged and decreed that the said defendant was not guilty of fraud, and that he be and he was required to file a full, fair, and complete schedule of his estate, real and personal, including moneys, notes, bonds, bills, obligations, and contracts for money or property of any and every description or kind, name or nature whatsoever, together with a true and perfect account of all the debts which he was at the time owing, and that he subscribe to an oath

as provided by statute in such proceedings, and that upon so doing he be discharged from custody and arrest under said execution, and that thereupon said defendant did file such
29 schedule, as he was ordered and decreed by said county court to file, and subscribed and swore to the same, as required by statute; whereupon he was by said court discharged; and the defendant says that in said proceedings in said county court of Cook county, Illinois, it was held, adjudged, and decreed in said cause that said judgment was not rendered for — on account of *hand* or deceit practiced by the said defendant, but for and on account of an indebtedness then existing from the defendant to the plaintiff, and against which the said defendant was entitled to schedule; that said judgment and decree is still in full force, not *approved* from, reversed, or set aside, and he says all of the pleadings, papers, and files and records of every character in connection with said cause in said county court were wholly destroyed by the fire on the 9th day of October, 1871, at the county aforesaid, and said records is not and was not at the time of the commencement of this suit in existence, nor was any copy thereof, to the defendant's knowledge.

And the defendant further says that on the 13th day of December, 1880, the district court of the United States for the district of Indiana granted to said defendant a certain discharge in these words and figures, to wit:

In the District Court of the United States for the District of Indiana.

In the Matter of JACOB FORSYTH, Bankrupt. In Bankruptcy. 3292.

30 DECEMBER 30, 1880.

Whereas Jacob Forsythe has been duly adjudged bankrupt under the act of Congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all requirements of law in that behalf:

It is therefore ordered by the court that said Jacob Forsyth be forever discharged from all debts and claims which by said act make provable against his estate, which existed on the 30th day of August, 1878, on which day the petition for adjudication was filed by him, excepting such debt-, if any, as are by said act excepted from the operation of a discharge in bankruptcy.

And that the said debt existing in favor of the said plaintiff against this defendant was provable against the said defendant in his proceedings in bankruptcy; and this the defendant is ready to verify.

Wherefore he prays for judgment if the plaintiff ought to have his aforesaid action against him.

THOMAS J. MERRIFIELD &
OLDS & GRIFFIN,
Att'ys for Def't, Jacob Forsyth.

And afterwards, to wit, on January 30, 1896, there was filed in the office of the clerk of said court a certain demurrer to additional plea, which is in the words and figures as follows, to wit:

31 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court of Cook County, of the January Term, 1896.

HENRY F. T. VEHMEYER }
vs. } Debt.
JACOB FORSYTHE. }

And the plaintiff, as to the plea of the defendant by him filed on January 28th, 1896, by leave of the court, as an additional plea to plaintiff's declaration, says that the same and the matters therein contained, in manner and form as the same are above pleaded, are not sufficient in law to bar him, the said plaintiff, from having his aforesaid action, and that he is not bound by law to answer the same; and this he is ready to verify; and the plaintiff shows to the court here the following causes of demurr- to the said above-mentioned plea, to wit:

1st. That said plea is double and presents and tenders more than one issue.

2nd. That said plea, so far as it sets up any matter of defense other then has already been pleaded to plaintiff'- said declaration, sets up matter- that are wholly irrelevant and immaterial to the issues in said case and which constitute no defense to said plaintiff's declaration, and the matters so pleaded are a departure from the
32 issues made by the declaration and other pleadings already pleaded in said case.

3rd. That which said plea purports to set up as a defense to said declaration a judgment of the county court of Cook county, it, the said plea, does not in manner or form set forth such judgment with particularity or certainty, and does not by reference or otherwise present any such judgment as a bar to the plaintiff's said action, but the matters in said plea relating to said judgment are argumentative only; and also for that said plea — in other respects uncertain, informal, and insufficient.

Wherefore, for want of a sufficient plea in this behalf, the plaintiff prays judgment and his damages, etc., to be adjudged to him, &c.

By M. W. ROBINSON,
Att'y for Plaintiff.

And afterwards, to wit, on February 15th, A. D. 1896, being one of the days of the February term of the superior court, the following, among other, proceedings were had and entered of record in said court, to wit:

33 HENRY F. T. VEHMEYER
vs.
JACOB FORSYTH. } 131,807. Debt.

This cause coming on to be heard upon the demurrer to the defendant's additional plea, filed in said cause January 28th, A. D. 1896, after arguments of counsel and due deliberation by the court, said demurrer is sustained.

And afterwards, to wit, on January 29th, A. D. 1897, being one of the days of the January term of the superior court, the following, among other, proceedings were had and entered of record in said court, to wit:

HENRY F. T. VEHMEYER
vs.
JACOB FORSYTH. } 131,807. Debt.

On motion of defendant, it is ordered that Mer-field and Hall be, and — hereby, substituted as attorneys for defendant in lieu of F.W. & F. J. Tourtelotte, withdrawn.

And afterwards, to wit, on June 24th, A. D. 1897, being
34 one of the days of the June term of the superior court, the following, among other, proceedings were had and entered of record in said court, to wit:

HENRY F. T. VEHMEYER
vs.
JACOB FORSYTHE. } 131,807. Debt.

On the agreement of the parties to this suit, now here made in open court, this cause is submitted to the court for trial without a jury, and the court now here, after hearing all the evidence adduced, the arguments of counsel, and being fully advised in the premises, finds the issues for the plaintiff, and that there is now due and owing from the defendant to the plaintiff the sum of eight hundred and thirty-three dollars and thirty-five cents debt, and assess the plaintiff's damages at the sum of two thousand and seventy-six dollars and ninety cents; whereupon the defendant enters herein his motion for a new trial in said cause. After arguments of counsel and due deliberation by the court, said motion is overruled and a new trial denied.

Therefore it is considered by the court that the plaintiff do have and recover of and from the defendant his said debt of eight hundred and thirty-three dollars and thirty-five cents, and also his said damages of two thousand and seventy-six dollars and ninety
35 cents, in form, as aforesaid, by the court found due and assesses, together with his costs and charges in this behalf ex-

Debt.....	$833.35
Da's	2,076.90
Entire ..	

pended, and have execution therefor. Whereupon the defendant, having entered his exceptions herein, prays an appeal from the judgment of this court to the appellate court in and for the first district of Illinois, which is allowed on fixing his bond in the sum of twenty-five hundred dollars, to be approved by the clerk of this court, within twenty days from this date, and leave given said defendant to file his bill of exceptions within thirty days from this date.

And afterwards, to wit, on July 23rd, A. D. 1897, being one of the days of the June term of the superior court, the following, among other, proceedings were had and entered of record in said court, to wit:

HENRY T. F. VEHMEYER
vs.
JACOB FORSYTH. } 131,807. Debt.

On the agreement of the parties to this suit, now here made in open court, it is ordered that the time for filing the bill of exceptions herein be, and — hereby, extended five days.

36 And afterwards, to wit, on July 28th, A. D. 1897, there was filed in the office of the clerk of said court a certain stipulation, which is in the words and figures as follows, to wit:

STATE OF ILLINOIS, }
County of Cook, } *ss*:

In the Superior Court of Cook County.

VEYMEYER
vs.
FORSYTH. } Case No. 131,807.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause, by and through their respective attorneys, that the bill of exceptions now on file in said cause may be incorporated in the transcript of the record to be used in the appeal heretofore taken to the appellate court in and for the first district of Illinois in lieu and instead of a copy thereof, and that said transcript, containing said original bill of exceptions, shall have the same force and effect in said appeal to said appellate court in like manner as if a copy of said bill of exceptions were incorporated in said transcript.

37 ## 131,807. Superior court. Vehmeyer *vs.* Forsyth. Stipulation *re* original bill of exceptions. Filed Jul- 28, 1897. John A. Luhm.

38 Dated Chicago, Cook county, Illinois, July 28th, 1897.

M. W. ROBINSON,
Att'y for Plaintiff.
THOMAS J. MERIFIELD &
ROBERT G. HALL,
Att'ys for Defendant.

(See # #.)

And heretofore, to wit, on July 27th, A. D. 1897, there was filed in the office of the clerk of said court a certain bill of exceptions, which is in the words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court of Cook County.

HENRY F. T. VEHMEYER
vs.
JACOB FORSYTH. } No. 131,807.

Bill of Exceptions.

39 Be it remembered that on the trial of the above-entitled cause, at the June term, A. D. 1897, to wit, on the 18th day of June, A. D. 1897, the same being one of the days of said term of said court, said cause came on for hearing before Jonas Hutchinson, one of the judges of said court, upon the pleadings before that time filed in said cause, M. W. Robinson appearing on behalf of said plaintiff and Thomas J. Merrifield and Robert G. Hall appearing on behalf of said defendant, and thereupon, by agreement of counsel, trial by jury was waived and said cause was submitted to the court for trial without a jury; and thereupon the plaintiff, to maintain the issues upon his part, introduced the following evidence, to wit:

JAMES FRAKE, a witness called and sworn *and* behalf of the plaintiff, testified as follows:

Direct examination by Mr. ROBINSON:

Q. What is your name?
A. James Frake.
Q. What is your occupation?
A. I am a lawyer, and have been since 1869 practicing attorney in Chicago, Cook county, Illinois.
40 Q. What was your business in 1871?
A. I was an attorney-at-law.

Q. Do you know anything in regard to an action brought by Vehmeyer, the plaintiff in this suit—Henry F. T. Vehmeyer—against Jacob Forsythe, the defendant in this suit, in 1870.

A. I do. The action was brought in 1870. I was then the partner of one Buschnell, under the firm name of Buschnell & Frake, and I conducted the suit.

Q. Did you bring that suit?

A. I brought it.

Q. Did you at that time keep a docket?

A. I did.

Q. A- that time, during the progress of this matter, did you make any entries in your office docket of the steps taken in that proceeding?

A. I did.

Q. Have you got that docket?

A. I have.

Q. Will you refresh your recollection to refer to that docket?

A. In some matters it would.

Q. You have that docket now in your hand?

A. I have.

Q. It is the original book?

A. It is the original book.

Q. Were the entries made at the time?

A. Yes, sir.

Mr. HALL: I object to his refreshing his recollection unless this is a memorandum made for that purpose by himself.

The COURT: Did you make those entries?

A. Yes, sir; I made every one of them.

Mr. ROBINSON:

Q. They are all in your handwriting?

A. Yes, sir.

The COURT: There is an objection here. If he can state all that the dockets contain without having examined it, his recollection entirely aside from the docket, why, then he should state
41 but if what he says he gets from the docket, why, then the docket may be used. He may recollect some of it and some not.

Mr. ROBINSON: Have you an independent recollection of these facts, or is your recollection largely derived from reference to your docket?

A. The kind of a case and the name of the party I have a perfectly independent recollection of.

Q. Now, then, you may state the names of the party to that suit.

A. Henry F. T. Vehmeyer—he was the plaintiff—against Jacob Forsythe, defendant; an action brought in the superior court and an action on the case. General No. I would have no definite recollection of.

Q. You may state any fact that assists to refresh your recollection about its being an action in the case.

A. Mr. Vehmeyer came to me—I remember him—and said——

Mr. HALL: I object to what he said.

The COURT: That is all right so far.

The WITNESS: He stated his case to me and stated——

Mr. HALL: I object.

The WITNESS: It came to my knowledge that an action against Mr. Forsythe in an action of assumpsit was worthless and could not be enforced.

Mr. HALL: I object to that as immaterial and move that that be stricken out.

The WITNESS: That is the fact.

The COURT: It may be stricken out.

The WITNESS: This action I determined to bring in case because from the facts an action of fraud and deceit was clearly main-
42 tainable. The declaration was drawn in case and a declaration containing one count was filed.

The COURT: There is a part in that answer that is incompetent.

Mr. ROBINSON: Did you bring the action?

A. I brought the action.

The COURT: Let that part where it says "an action of fraud and deceit was clearly maintained" be stricken out.

The WITNESS: I drew the declaration of one count.

Mr. ROBINSON: Do you remember the contents of the declaration?

A. Well, I remember the substance.

Q. Did you file it?

A. I drew the declaration and filed it. The general issue was pleaded to that declara-ion.

Q. By reference to any memorandum you have in mind, can you state when you filed that declaration?

The COURT: Have you an independent recollection of it?

Mr. ROBINSON: Have you an independent recollection, aside from that?

The COURT: Now, what we want is his independent recollection of these matters.

Mr. ROBINSON: Have you an independent recollection, aside from the declaration filed?

A. As to the date of when the suit was commenced and the date it showed I filed the declaration, I would not have an independent rec-llection of that.

Q. Did you make a memorandum in your book of those dates?

A. I did.

Q. Will you please refer to them, the date when that suit
43 was brought and the date when you filed your declaration?
A. The suit was brought on the — day of July, 1870. The declaration was filed on the 21st day of July, 1870.
Q. Can you produce a substantial reproduction of that declaration?
A. I can.
Q. Please do so.

Mr. HALL: I object to that, if the court please.

The COURT: We will have to find out a little about it.
Mr. ROBINSON: Have you any copy of that declaration?
A. I have not a copy of the declaration.
Q. Do you know what became of the original files of that case?
A. The original files of that case, with all the files of the superior court of Cook county, were burned on the morning of October 9th, 1871. I was downtown and I saw them burn.
Q. You have a personal knowledge of that fact?
A. Yes, sir.
Mr. HALL: How do you know that?
A. I saw the contents of this court-house from top to bottom burn—not this court-house, but the court-house that stood on this place—burned with all the records.
Mr. ROBINSON: The records were kept in the vaults at that time?
A. The record- were kept in the vaults. I saw the whole contents of the court-house go. I examined the vault, I think, Monday night.
Q. You saw the condition of the vault?
A. Yes, sir; after the fire.
Q. Is it possible to produce an original declaration?
44 A. It is not.
Q. Nor any copy of it?
A. It is not.
Q. Did you preserve any copy made at the time?
A. I did not.
Q. Do you know what sort of a declaration you made?
A. I do.
Q. What is the form of the declaration?

Mr. HALL: I object to that.

Mr. ROBINSON: I will ask him this. (To the witness:) I will ask you to reproduce as fully and completely as you can the contents of the declaration filed by you in that case.
A. I have done it and written it out here and hold it now in my hand.

Mr. HALL: I object to that.

Mr. ROBINSON: I ask to offer that. I ask you to state what that is you hold in your hand.
A. It is a copy of or reproduction of the original declaration in the case of Jacob Forsythe or Henry F. T. Vehmeyer against Jacob

Forsythe, filed in the superior court on the 21st day of July, 1870.

Q. I will ask you to state substantially whether it is a copy of that declaration.

A. It is, to the best of my knowledge and belief and recollection.

The COURT: When did you make it?

The WITNESS: It was made some time before the last trial of this case.

The COURT: Well, when—about when?

A. Well, I should say about a year before the trial.

The COURT: About when?

A. Three or four years ago.

45 Mr. ROBINSON: About four years ago?

A. Yes, sir.

Q. I guess it was made some time in the fall of 1893?

A. Along there.

Mr. ROBINSON: It does not pretend to be a copy made from and by comparison with the original. It pretends to be from his personal recollection of what that declaration was, and put in that form.

The COURT: He may state his best recollection.

To which ruling of the court the defendant, by *its* counsel, then and there duly excepted.

Mr. ROBINSON: Go on and state your best recollection of what that declaration contained.

Mr. HALL: But not with reference to that document (referring to the paper held by witness).

The COURT: His reproduction of that declaration?

Mr. ROBINSON: Yes. (To the witness:) Give as near as you can the contents of the declaration.

A. I would prefer to stop and think about the declaration I drew.

The COURT: Did you draw it?

Mr. ROBINSON: Did you draw it with the use of a form book?

A. I did.

Q. What form book?

A. Puterbaugh's, I remember, and Chitty were the books I used.

Q. Go ahead and let us see how well you get along with the ordinary form of a declaration. Did you follow the forms contained in the form book you used for the purpose of drawing the declaration?

A. I did.

46 Q. Would it aid your memory if you had that form book before you?

A. It would, decidedly.

Q. Have you got Puterbaugh's here?

A. I have not.

Q. Did you prepare it from Puterbaugh?

A. I did.

Q. The papers you have before you, was that prepared from some form you used before?

A. I believe it to be.

Q. You may go ahead now. You say that was prepared from the

form, so far as the formal parts are concerned. Refresh your recollection and state to us in that way the contents of the declaration.

Mr. HALL: That is objected to.

The COURT: He may answer.

To which ruling of the court defendant, by his counsel, then and there duly excepted.

A. It would be: "Superior court of Cook county, to the July term, or of the August term, 1870. County of Cook and State of Illinois. Henry F. T. Vehmeyer, by Buschnell & Frake, his attorneys, plaintiffs, complains of Jacob Forsythe, defendant, summoned, etc., in a trespass on the case, for that whereas, heretofore, to wit,"——

The COURT: Is it necessary to take up time with the details? I do not think so.

Mr. ROBINSON: Yes. (To the witness:) Go on, rapidly.

The WITNESS: That heretofore, to wit, on the 10th day of August, 1868——

Mr. HALL: I object to his referring to that document he holds in his hand.

The COURT: Look at the document. If there is anything in the document——

The WITNESS: Where I have got a dozen men driving at
47 me I can't do anything. (Continuing:) In order to induce the plaintiff to advance him a large amount of money, to wit, the sum of $1,500, I think the declaration would say——

Mr. HALL: I object. The witness is reading from his document again.

The WITNESS: I was not.

The COURT (to the witness): Just close that.

The WITNESS (continuing): $1,200, falsely and fraudulently represented unto the plaintiff that he had a large amount of birch cord-wood, to wit, the sum of 200 cords, cut and piled up near the Pittsburg and Fort Wayne, or, I should say——

Mr. ROBINSON: That's right.

Mr. HALL: Let the witness testify.

The WITNESS: The Pittsburg and Fort Wayne, in the county of Lake and State of Indiana, ready to be shipped to Chicago; that said wood was contracted, or rather, perhaps, one Eldridge had contracted, to purchase said wood at $6.00 per cord in the city of Chicago when shipped, and that if Vehmeyer, the plaintiff, would advance to him at the rate of $5.00 per cord for the 200 cords of wood he, defendant, would immediately——

Mr. ROBINSON: Who would?

Mr. HALL: I object to that—to the counsel prompting the witness.

The WITNESS: Well, he, the defendant, would immediately
48 ship said cord-wood to the city of Chicago.

Mr. MERRIFIELD: Your honor, he is looking at the paper again.

The COURT: He has got it folded up.

Mr. HALL: He is getting it in evidence just the same.

The WITNESS: I didn't. What's the use of telling me that? That the plaintiff Vehmeyer, relying upon these representations as being true, advanced to the plaintiff——

Mr. ROBINSON: To the defendant.

WITNESS: To the defendant.

Mr. HALL: I object.

Mr. ROBINSON: It is a mere slip of the tongue.

Mr. HALL: Well, you should not prompt him.

The WITNESS (continuing): Advanced to the defendant the said sum of—I think the declaration said the sum of $1,200 or $1,000; that the said defendant shipped only the sum of forty cords of wood to the said Eldridge, from which the said Vehmeyer received the sum of $6 per cord. I don't know whether it is right or not.

Mr. ROBINSON: Was there any allegation of fraud and deceit?

The WITNESS: That the representations of the defendant falsely—were false and fraudulent; that he did not have nor never did have in the county of Lake and State of Indiana 200 cords of birch wood, piled up, ready for shipment to the city of Chicago, to sell said Eldridge, but only had—neither in the county of Lake or anywhere else—but only had the sum of forty cords of birch wood, which was shipped by the said defendant to the said Eldridge.

49 Mr. ROBINSON: Well, did you allege damages?

(Witness consulting paper.)

Mr. HALL: I object to his referring to the paper.

The COURT: Did you say anything about the damages?

Mr. HALL: He is looking at the paper again.

The COURT (to the witness): I won't have you use that again; I will get that out of the realm of controversy.

The WITNESS (continuing): Wherefore the defendant was therein——

Mr. ROBINSON: The defendant? The plaintiff, you mean?

The COURT: That's not competent.

Mr. ROBINSON: It is just a mere slip of the tongue.

The COURT: I know it, but the proper way is to stop him and ask questions and find out.

Mr. ROBINSON: Do you recollect what damages were alleged?

The WITNESS (continuing): Wherefore the plaintiff was damaged to the extent of $1,500 was the amount that was alleged in the declaration, and thence he brings this action of fraud and deceit against the defendant.

Mr. HALL: I object to all of the statements of the witness pretending to make up an alleged declaration in this case, as he had recited them, on the ground that it simply purports to be a substantial copy made from the recollection of the witness some twenty years after the alleged declaration was filed.

The COURT: That objection is overruled.

To which ruling of the court defendant, by his counsel, then and there duly excepted.

50 Mr. ROBINSON: Do you remember whether there was one or more counts in the declaration?

A. There was only one count in the declaration; of that I am certain.

Q. Do you remember whether the defendant pleaded to the declaration?

A. He did.

Q. Do you remember what the plea was?

A. The plea was not guilty.

Q. Was there any other issue in that case?

A. No, sir.

Q. Do you remember the circumstance of that case being tried?

A. I do, well.

Q. Can you state the date of the trial?

A. Only by reference to my memorandum book.

Q. Well, refer to that and tell us when the verdict was rendered?

A. The verdict was rendered on the 9th day of May, 1871.

Q. I will ask you to state whether that verdict or any other record or proceedings in that case are now in existence.

A. No, sir.

Q. What became of them?

Mr. MERRIFIELD: If you know, if the court please.

The COURT: Yes.

The WITNESS: I saw them burn.

Mr. ROBINSON: Is it possible to produce that verdict or the record of the judgment?

A. No, sir.

Q. Did you see that verdict?

A. I did.

Q. Did you know what the verdict was; can't you give its contents?

A. Yes, sir.

51 Q. State it.

Mr. HALL: I object on the ground that he is attempting to restore this record at this time, and on the further ground that it should have been restored before this suit was brought.

The COURT: The objection is overruled.

To which ruling of the court defendant, by *its* counsel, then and there duly excepted.

The WITNESS (continuing): We, the jury, find the defendant guilty, and assess the plaintiff's damages at $833.35, and signed by the foreman of the jury.

Mr. ROBINSON: What other proceeding at that time—whether there was a motion for a new trial?

The WITNESS: Defendant entered a motion for a new trial in the case.

Q. Do you know when that was disposed of and the judgment rendered?

A. Yes, sir.

Q. Give the date.

A. On the 29th day of July, 1871.

Q. Now, do you know what the judgment—what the record of the judgment of the court that was rendered at that time?

A. I do. I think I do, at least.

Q. Did you see it before the destruction of the record?

A. I did.

Q. You may state the circumstances under which you saw it—how you happened to see it.

A. Nearly, perhaps, a month or more after the verdict was rendered or the judgment was rendered I went to the clerk, George Gary, and wanted a writ on which I could arrest Jacob Forsythe on the judgment, and he said——

52 Mr. HALL: I object to what he said.

The WITNESS (continuing): Well, he and I went together and we examined the files and record of that judgment, and I saw the judgment at that time, and the writ was issued.

Mr. ROBINSON: Can you now, from what you then saw, state what the judgment was?

A. I can, substantially.

Mr. HALL: I object to his stating the contents of it substantially.

The COURT: You may state so far as you recollect.

To which ruling of the court defendant, by his counsel, then and there duly excepted.

A. Henry F. T. Vehmeyer, plaintiff, *vs.* Jacob Forsythe, defendant. Case. This day came on to be heard the motion of defendant to set aside the verdict aforesaid and for a new trial of said cause; — was argued by counsel, and the court being fully advised in the premises, doth overrule said motion. Therefore it is ordered by the court.

Mr. ROBINSON: Considered.

Mr. HALL: I object to that.

The COURT: Yes; it is not proper. I sustain the objection.

The WITNESS (continuing): Therefore it is considered by the court that the plaintiff have and recover from the said defendant his said damages, $833.35, in form as assessed by the jury aforesaid, together with his costs in this behalf expended, and that he have execution therefore.

Mr. HALL: I move that the answer be stricken out on the ground it is attempting to give the contents of the record, and that
53 the record should have been restored before this suit was commenced—the same objection as has been made before.

The COURT: Save your point.

To which ruling of the court defendant, by his counsel, then and there duly excepted.

Mr. ROBINSON: I will ask you to state whether or not any process was issued at that time.

A. Yes, sir; there was.

Q. Do you know what it was?
A. A *capias ad satisfaciendum.*
The COURT: Did you see the writ?
A. I saw the writ; took the writ and gave the writ to the sheriff of Cook county, and also gave him $5, or a little less than $5—$4.35 or 55 cents: I can't recollect the exact figures; I know what the fee was at that time.
Q. State any facts you know in regard to the execution of that writ.
A. Subsequent to that writ, in about the middle of September, I should say, Mr. Forsythe was arrested and placed in jail—Jacob Forsythe.
Q. The defendant?
A. The defendant.

Cross-examination by Mr. HALL:

Q. When did you last see the records and files in this case that was brought in 1870?
A. It was some time—it was the day that the writ was issued.
Q. What day was that?
A. Well, I can't give you the exact date of it. I didn't make a memorandum of that date.
54 Q. How long prior to the great Chicago fire, October 9th, 1871, was it?
A. Yes, sir.
Q. How long prior to that?
A. Well, it was in August or September prior to the fire in 1871.
Q. Do you know whether it was in August or September; which was it?
A. I should say it was in August; that would be my best recollection.
Q. In the fore part of August or the latter part of August?
A. I should say in the latter part of August.
Q. What records or files did you see at that time?
A. I saw the entire files and saw the judgment-docket record.
Q. State what files you saw.
A. I saw the files in the case—the declaration, the general issue, the verdict, the instructions to the jury.
—. What record did you see?
A. I saw the judgment record.
Q. The judgment records?
A. Yes, sir.
Q. Didn't you you testify on the former trial of this case that you examined the judgment docket with the clerk?
A. Yes, sir; and that is what I mean now when I said judgment record; I mean judgment docket.
Q. Did you not testify you examined the judgment record?
A. The judgment record?
Q. Yes.
A. I examined that instrument—that book that had the judgment written up in it.

Q. The judgment written up in it?
A. Yes; whatever you call it. I don't know what you call it.
Q. Where did you examine that record?
55 A. In the court-house, in the clerk's office.
Q. In the clerk's office or in the vault?
A. I can't tell.
Q. You don't know which?
A. It was in the custody of the clerk.
Q. After you had seen the files and record of this case in August, 1871, did you see any of them after that date?
A. No, sir.
Q. Do you remember when the fire—that great fire was?
A. I remember it very well, sir.
Q. What was the date?
A. It commenced on Sunday night, October 8th, and completed on Monday, October 9th, 1871, and never do I want to see another.
Q. Do you know personally whether the records in this case were in the court-house in Chicago at the time of the fire?
A. I know nothing except that the entire records of the superior clerk's office, from stem to stern, that was in the court-house at that time was destroyed, for I saw them burned, and examined the court-house the next day.

Mr. HALL: I move to strike out, because it is not responsive. I asked him whether he knows personally whether the record of this case was destroyed in the fire of 1871.
The COURT: Answer yes or no, and then you may make any explanation you wish to.
A. I do not know personally that these records were burned, except that the contents of the superior clerk's office, with all of their records, were burned. That part of it I do know.
Q. Mr. Frake, were you attorney of record in this case originally?
A. What do you mean by this case?
56 Q. Were you the attorney in this case in 1870?
A. I was myself, and Mr. Bushnell, under the name of Buschnell & Frake.
Q. Did you bring this suit in 1890?
A. I did. This present suit?
Q. This *this* present suit.
A. I did; yes, but I have had nothing to do with it since I brought the case.
Q. How long after the judgment was entered before you brought this suit?

Mr. ROBINSON: I object. It is a matter of computation.

The WITNESS: A little less than twenty years.
Mr. HALL: A little less than twenty years?
A. Yes, sir.
Q. During that period have you examined the facts in this case or talked them over?
A. Yes. Mr. Vehmeyer had for five or six years been drumming

at me to bring this suit, and like a lawyer that has been very busy I neglected to bring it.

Q. You waited for nineteen years before bringing this suit?

A. No, sir.

Q. How long did you wait?

A. I waited five years after, I think, Mr. Vehmeyer told me to bring it.

Q. Have you any specific interest in any judgment that may be recovered in this case?

A. No, sir.

Q. Have you any arrangement with Mr. Vehmeyer for the amount of fees you are to get out of it?

A. No, sir; none whatever.

Mr. HALL: That is all.

57 Redirect examination by Mr. ROBINSON:

Q. I will ask you why the bringing of this suit was delayed so long.

A. Mr. Forsythe was considered execution-proof until after his wife died.

Mr. HALL: I object.

Mr. ROBINSON: I withdraw the question.

Mr. HALL: I object to his withdrawing it.

The COURT: Well, then, let it stand. Do you object to the question being withdrawn and the answer excluded?

Mr. HALL: I want the record to show it.

The COURT: To show what?

Mr. HALL: The questions of counsel and the answers of the witness.

The COURT: Well, the counsel says he withdraws the question and moves that the answer be stricken out. Do you object to it?

Mr. HALL: No.

Whereupon the furthe- taking of testimony was continued until 2 p. m.

CHICAGO, *June 18th*, 1897.

R. R. STEVENS, a witness called and sworn on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. ROBINSON:

58 Q. What is your name?

A. R. R. Stevens.

Q. What is your present employment?

A. I am engaged with the Security Title and Trust Co., abstract-makers.

Q. What was your business in the summer of 1871?

A. I was engaged with Chase Brothers & Company in the same business.

Q. How early in 1871 were you occupied in that business?

A. All the year of 1871.

Q. What was the business of Chase Bros. & Co., in which you were engaged?

A. Makers of abstract- of title.

Q. Makers of abstracts for hire for other persons?

A. Yes, sir.

Q. And carrying on that business?

A. Yes, sir.

Q. What was your business in 1870?

A. The same business.

Q. Did you in the course of that employment make any memorandum or entries for the use of that firm relating to a suit wherein this present complainant, Vehmeyer—Henry F. T. Vehmeyer—was plaintiff, and this present defendant, Jacob Forsythe, was defendant?

A. I did.

Q. In the superior court?

A. I did

Q. You may state in what form you made your memorandum and entries.

A. We had books prepared for that purpose.

Q. You mean the firm?

A. Yes; called dockets.

Q. You mean the firm of Chase Bros.?

A. Yes; wherein we entered the title of a case, when it was commenced, the nature of the action, date of commencement, and all subsequent orders that were entered in the case, for our business.

Q. Those, you say, were entered in a book?

A. Yes, sir.

Q. Have you the book of that firm in which you made the
59 entries relating to this case?

A. I have.

Q. Will you please designate how the book is described, the volume, etc.?

A. Volume 18, Judgments of Superior Court, in cases from 30670 to 32334, inclusive.

Q. Will you turn to the page containing the entries made by your relating to that case?

A. Yes, sir.

Q. Upon what page do you find it?

A. 55; vol. 18.

Q. State what there appears in regard to the title of the action.

Mr. HALL: That is objected to.

The COURT: On what ground?

Mr. HALL: I object to the book itself on the ground that it will appear upon examination of the witness that this is not an original entry.

Mr. ROBINSON: I will go back.

Mr. HALL: It is simply a copy.

Mr. ROBINSON: Who made the entries in that book in this case

A. I made them myself.

Q. State whether there were made at the time.
A. Yes, sir; at the time the suit was commenced.
Q. You may state from what source. State the name of the parties to the action as you find it there.
A. Henry F. T. Vehmeyer against Jacob Forsythe.
Q. State what is the number of the case in the superior court.

Mr. HALL: He is testifying from this record and offering it in evidence; to which I object on the ground that it is merely a copy of the original record of the court and it is not the best evi-
60 dence. This is a book belonging to the abstract-makers, and it is not a book kept by the clerk of the court. It is not the best evidence in this case.

Mr. MERRIFIELD: It is incompetent because it is not a copy of the record, but it is a copy of memorandum upon the judgment docket, which is not part of the record on which the suit is founded.

Mr. ROBINSON: What do you find the number of the case?
A. 31053.
Q. What was the form of action?

Mr. HALL: I object to that.
The COURT: In view of the objection, I want him to state from what he made that entry.
Mr. ROBINSON: I intend to follow that immediately afterwards.
The COURT: On that promise, I will let him answer.
To which ruling of the court defendant, by his counsel, then and there duly excepted.
Mr. ROBINSON: I ask you to state what was the form of action.
Mr. MERRIFIELD: The memorandum shows for itself.
The COURT: Of course it will show for itself, but if the book—if you offer the entries, they are in evidence.
Mr. ROBINSON: I offer it now, but it is a book that cannot be accom-odated out of that office.
The COURT: I understand it.
Mr. ROBINSON: I want to get it in the record.
The COURT: The proper way would be to prove the com-
61 petency of that book in evidence, and then offer the entry in evidence, and then let him read the entry.
Mr. ROBINSON: Very well.
The COURT: And then the book speaks for itself.

Mr. ROBINSON (to the reporter): Now, you may scratch out the last question and answer. (To the witness:) From what sources of information do you obtain the matters which you entered in the book as to the title of the case, and as to the number of the case, and as to the form of action?
The COURT: As to all of the entries.
Mr. ROBINSON: They came from different sources. From what source did you obtain those?
A. From the files and records in the office of the clerk of the superior court of Cook county.
Q. Is that true in regard to all of those entries that you made?

A. Yes, sir.

Q. And at what times were they taken from the files and records?

A. At the time the papers were filed and orders entered, the same date.

Q. Who took those entries?

A. I took them myself.

Q. And on what did you take them?

A. I entered them directly into this book.

Q. Directly into that book?

A. If you will allow me to state; I kept all these books at that time in the office of the clerk of the superior court. All the books pertaining to our judgment records were kept in that office.

Q. So that they were obtained from the original source at the time and entered directly into that book at the time?

62 A. Yes, sir.

Mr. ROBINSON: Now, we offer the entries relating to that case taken in the book in evidence.

Mr. HALL: We renew our objection on the same ground stated to the court before: this is a mere copy made from original records in the court; that — is not the best evidence, because it is not the record of the clerk of the court, who is the proper person for keeping them.

The COURT: Ask him where those files are which he examined.

Mr. ROBINSON: Where are the original files from which you took these entries?

A. They were destroyed in the great fire of October 8th and 9th, 1871.

Q. That is, the originals of the entries you made in that book relating to this case?

A. Yes, sir.

Q. Were the originals of the entries you made in that book relating to this case destroyed?

A. Yes, sir.

The COURT: Well, I think I will let it go in evidence.

To which ruling of the court defendant, by his counsel, then and there duly excepted.

The COURT: I will not let him read anything farther than what he has from the entry.

Mr. ROBINSON: I will ask you to state, from your reference to that book and the entries in this case in that book, whether the matter therein stated—memorandum made in regard to matt-rs affecting the case of Vehmeyer against Forsythe—are true?

A. They are.

Q. And whether they truly and correctly represent the files and records of the case.

A. To the best of my knowledge and belief.

63 Q. How long have you been in that business, Mr. Stevens?

A. Since 1854.

Q. You are an old clerk of court, to begin with, are you not?

A. No, sir; but I was clerk in the circuit court from 1878 to 1893.

Q. I will ask you to state whether that book is used by the firm of Handy & Co. in their abstract business, furnishing abstracts for hire.

A. It is.

Q. And whether the entries then made are used as a part of the abstracts of title which they furnished for and titles in Cook county.

A. They are.

Q. I will ask you to state to whom that book belonged; to whom does the book belong?

A. Well, sir——

Q. (Interrupting.) By whom is it kept?

A. It is kept by Handy & Company, or the Title Guarantee & Trust Company. That is a concern now in whose possession the books are.

Q. I will ask you to state if they accom-odate that book out of their office, to be kept or used outside of their office, except for very short intervals of time.

A. This is the first instance I have known them to do it, to my knowledge.

Q. Is it now in the custody and in the charge and keeping of one of their employés?

A. Yes, sir; it is.

Q. In view of the fact that the book is not accom-odated to be left as testimony in this case, I will ask you to state just what it is on the page to which you have referred in this case—the entries made by you in the case.

64 Mr. HALL: I think the court has ruled that what he testified to is all that is admitted. The witness has given a part of the contents of that order as it appears on the book. (To the court:) Did not the court rule that is all you would admit?

The COURT: No; the whole of it is offered, and there is only one way of getting it before me, and that is to read it.

Mr. HALL: Of course, subject to the objections that have been made.

The COURT: Yes.

Mr. ROBINSON: Now, then, commence and state what that book contains—all entries relating to the case in question.

A. Case No. 31053.

Q. Read the title which is there; go right on.

A. Henry F. T. Vehmeyer.

Q. In the column names of parties, do you mean?

A. Yes.

Q. State it as you go along.

A. Under the column of parties, "Henry F. *P.* Vehmeyer *vs.* Jacob Forsythe;" under the heading "action," "trespass on the case;" under the heading of when commenced, "July 16, 1870;" under the heading of date of judgment, "May 9th, '71;" "record and amount, etc., verdict, $833.35;" "motion for a new trial;" under the heading of date of judgment again, "July 29, 1871, motion de-

nied and judgment and appeal allowed." Shall I give books and pages where entries are made?

Mr. ROBINSON: Yes.

65 A. The verdict was rendered in Record No. 2, page 492, of the superior court; the record of judgment was entered in volume 6, page 244. Under the heading of costs, $28.20; under the heading of fee book, Fee Book 40, page 549; under the heading of execution, 16963.

Q. What does that mean—number of execution?

A. Number of writ; yes, sir.

Mr. ROBINSON: Now, have you prepared, Mr. Stevens, and can you furnish, for the purposes of this trial or for the record in this case, a copy showing these entries that are taken in the book?

A. Yes, sir; I have a copy here.

Mr. HALL: I object to the copy.

Mr. ROBINSON: Made for the purpose of this case? I think if counsel were entirely fair they would agree that is a copy, and allow it to go in in place of the original book.

Mr. HALL: I think it is in the record in place of putting the book in.

Mr. ROBINSON: I think it is, but it is perhaps a little more clear as a table. I submit, your honor, that is a fair presentation of evidence for the purpose of a record in this case. Here is a book that cannot be left, and it is a mere matter of delay. The gentlemen themselves can examine them with that paper—the matter that is contained on that page of that book relating to this case.

Mr. HALL: Saving our rights and saving our objections to that, there is no objection to putting in a written copy in the same form as it appears in the book, so that it may appear in the record in that way.

66 Mr. ROBINSON: Will you please examine it yourselves and see if you find it to be exactly as the pages are?

Mr. HALL: This is made by Handy.

Mr. ROBINSON: This is furnished from their books. I suppose the clerk made the entry that, by agreement of counsel, the paper marked Exhibit A is agreed to be a correct copy of the entries in the book referred to, and that Exhibit A may be substituted in evidence for the entries contained on the original book. I believe that is all.

The page herein next following, marked Exhibit A, was thereupon introduced in evidence by the plaintiff.

No. of case.	Names of parties.	Action.	When commenced.	Date of judgment.	Record.	Amo'nt of judgment.	Costs.	Fee book.	No. of execuți'n.	Date of execution.
31,053	Henry F. T. Vehmeyer *vs.* Jacob Forsyth.	Trespass on the case.	July 16, 1870	May 9, 1871 July 29, 1871	2,492. Mo. N. T. mo. deni'd. 6,244.	Verdict. 833.35, and judg't & appeal'd.	28.20	40,549	16,963	Aug. 19, 1871

68 STATE OF ILLINOIS, } ss:
County of Cook, }

Henry H. Handy, being first duly —, on oath states that the writing here attached is a true copy from a judgment docket formerly belonging to Chase Bros.; that the minutes and extract contained in said judgment docket were made from the records and files in the office of the clerk of the superior court of Cook county, Illinois, prior to the destruction of the records of Cook county, Illinois, which occurred on or about October 8th and 9th, 1871; that said judgment docket containing said minutes and extracts was at the said date of the destruction of said records in the possession of persons who were then engaged in the business of making abstracts of title for others for hire.

That affiant is a member of the firm of Handy and Company, who are engaged in making abstracts of title to lands in said county for others for hire, and that the said judgment docket containing the minutes and extracts from which the said copy is made is now in the possession of affiant, as manager of abstract department of the Title Guarantee and Trust Company.

HENRY H. HANDY.

Subscribed and sworn to before me this twelfth day of January, A. D. 1894.

[SEAL.] EDWARD OLSOTT CHASE,
Notary Public, Cook Co., Ill.

69 Cross-examination by Mr. HALL:

Q. Have you seen any other book or record similar to this covering or purporting to cover the entries in this case?

A. I have not.

Q. From what source did you get the title to the case as it appears on this book of record?

A. From the papers filed in court.

Q. From what paper?

A. Whatever they were. I have no distinct recollection of what they were. The precipæ, I presume.

Q. Do you remember?

A. Oh, no.

Q. From what source do you get the entry "Trespass on the case"?

A. From the same papers.

Q. Do you know from what papers?

A. I don't remember.

Q. Are those entries made at one and the same time or at different times?

A. They were made on the day according to the dates they appear to be there.

Q. They are made on the dates that are written here?

A. Yes, sir.

Q. Under the different headings?

A. Yes, sir; they are written on there, filed such a day. Jul- 16th it was filed.

Q. From what source do you get the entry "Verdict, $833.35"?

A. First from the minute book of the clerk of the court.

Mr. ROBINSON: Anything further? You said, "First from."

Mr. HALL: That is all I asked him. That is responsive. From what source did you get the entry, "Motion for a new trial"?

A. The same book.

Q. From what source did you get the entry "Motion denied, and judgment and appeal"?

70 A. From the minute book, the clerk's minute book.

Q. Are you liable to make error in making these entries?

A. I am liable to err, like any other person.

Q. If a record should be offered in this case, made by a gentleman who was employed in the same business as yourself at that time, showing that this case was in assumpsit, would that weaken your faith in that entry?

A. Not at all.

Q. Might you not be wrong?

A. I do not think I am wrong.

Q. Did you ever see any other record in this case which reported it as being in assumpsit?

A. I have seen no other books of this nature.

Q. Of this nature?

A. No.

Q. Did you testify in this case on the former trial?

A. I think I did, before Judge Payne.

Q. Do you remember a similar record in another record book similar to this being offered?

Mr. ROBINSON: I don't think that is a proper question to put to the witness.

The COURT: I do not see as that is cross-examination in any way. I sustain the objection.

To which ruling of the court defendant, by his counsel, then and there duly excepted.

Mr. HALL: That is all, if the court please.

Redirect examination by Mr. ROBINSON:

Q. You were asked from what source you obtained several entries. From what source did you obtain the entry of judgment?

71 A. I obtained that from the clerk's minute book. That is my first knowledge I had of it. Afterwards compared with the record in which the orders were written of the court and the number of book and page as given here.

Q. So you examined the original record of judgment?

A. Yes, sir.

Q. And compared with it the entry?

A. Yes, sir.

Q. In which is noted the book and page of that entry?

A. Yes, sir; compared it.

Q. You were asked with regard to the degree of your certainty as to the form of action, it being an action of trespass on the case. From what do you speak with that positiveness?

A. No.

Q. Did you ever happen to discover any error in the entries you made in this way?

A. No, sir.

Q. If there should be produced by some other person a memorandum stating that this action was in assumpsit, would you believe that entry was correct or that your own was correct?

Mr. MERRIFIELD: He had already answered that.

Mr. ROBINSON: You may state.

The COURT: I didn't hear what you said.

Mr. HALL: Let him answer that question again.

The COURT: No. I didn't hear what Mr. Merrifield said.

Mr. MERRIFIELD: I said that he had already answered that in response to a question we put.

Mr. ROBINSON: I asked him to simply state some reason for it. He answered, if he could see it he would not believe it was true; that he would believe his own entry. I do not know as I care very much for it. He has, perhaps, said all that he need to.

72 Q. Do you think there is any likelihood you did make a mistake in regard to that element in the case?

A. No, sir.

Mr. HALL: I would like to ask one more question, if the court please.

The WITNESS: If you will allow me——

Mr. ROBINSON: Yes. State anything you want to.

The WITNESS: If that had been written "Trespass upon the case upon promises," I should have written it assumpsit.

Mr. HALL: I object to that and move to strike it out, if the court please.

The COURT: Yes. I think that should go out.

To which ruling of the court plaintiff, by his counsel, then and there duly excepted.

Recross-examination by Mr. HALL:

Q. Do you know whether or not Handy & Co. have in their possession and use a book of records similar to this?

(Question withdrawn.)

Q. Did you ever see the judgment docket covering the period at which this judgment was entered, owned and kept by Shortall & Hoard?

Mr. ROBINSON: That is objected to. The gentleman is assuming that they keep a judgment docket. I do not believe the question is fair. I do not believe they kept any such a book. You mean an abstract of judgment record?

Mr. HALL: An abstract of judgment records.

73 Mr. ROBINSON: Well, that might be better. I do not think that that question is quite fair. If there was any other book that they are going to ask him about, I think they should produce it and examine him with reference to the book, and not ask him about something that is not before the court, and we don't know what he is talking about.

The COURT: I take it that that is a matter of defense; that would not come in under cross-examination. I do not think it is cross-examination.

Mr. HALL: Perhaps that's so. That is all, Mr. Stevens.

JAMES FRAKE, a witness called and sworn on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. ROBINSON:

Q. I am not sure whether I asked you when you were on the stand whether the office docket that you testified about and referred to showed the number of the original case in the superior court that this suit was based on, for I forgot it; does your docket show the number?

A. It does.

Q. What is the number shown, the general number?

Mr. HALL: Of course, we make the same objection to his test-fying from the docket as was made to the other testimony
74 in regard to the entries in his docket.

The COURT: Of course, now that necessarily is a matter about which he cannot testify from refreshing his recollection. If it is competent, it is competent to offer it as entry from this book, and that would speak for itself, I take it. I assume that a man would not have his recollection revived by that, so that he could tell independent of it what the number was. Now, as I recollect the testimony of Mr. Frake, it was that he made these entries in this docket—his office docket—at the time of the transactions, and that they were true and correct; that is my recollection of his testimony. Now, then, that being so, I take it, it is competent to offer in evidence the docket entry for the purpose of showing this number.

Mr. ROBINSON: Very well; we offer that docket in evidence for the purpose of showing it.

The COURT: Very well.

Mr. HALL: I would like to see that book.

The COURT: Now, as refers to that, when was that number put in there?

A. The next day after I saw it in the files or when I looked for the different records; I can't tell.

Q. Did you put it there?

Mr. ROBINSON: I suppose it may be agreed in this record that the book shows the number——

The WITNESS: There is two numbers; one is term number and the other is general number.

75 Mr. ROBINSON: I offer that book as showing the general number of the suit to be 31053.

Mr. HALL: Do you offer all of the entries upon that page of that docket?

Mr. ROBINSON: I think I have all the other testimony.

Mr. HALL: I don't think counsel should be allowed to offer part of it unless he offers all of it and allows us to make our objection to it. There are entries upon this page which have not been testified to by the witness. If Mr. Robinson wants to offer a part of this page and the court allows it to go in, it should all go in.

The COURT: If there is anything upon that page that shows or tends to show that that number is not correct, it should go in evidence; in other words, if there is anything in that docket that tends to impeach the correctness of that number, it may go in.

Mr. ROBINSON: I will ask you to state whether that case was tried by jury.

A. It was.

Q. I will ask you to state whether the evidence was offered and introduced on the part of the plaintiff.

A. It was.

Q. Under the issues in the case?

A. It was.

Cross-examination waived.

Whereupon the plaintiff rested his case.

Mr. HALL: We desire to make a short motion.

The COURT: Well?

Mr. HALL: I think a finding here should be made in favor
76 of the defendant, on the ground that there is no competent proof here of the judgment sued on, and on the further ground that even if there is any proof tending to show a judgment, that the entry of the record of that judgment has not been shown, and that therefore a mere part of the record of judgment would not be competent to establish a judgment.

The COURT: Well, now, do you desire the court to infer from what you now state that there is another record in the hands of Handy & Company that the plaintiff has not produced. There is something further about this case than what Mr. Stevens has presented here; that, in other words, there is anything that the plaintiff has suppressed in the way of a record?

Mr. HALL: Oh, no, if the court please, I do not. The other record we will show by the way of defense, and your honor knows what it will be.

The COURT: Well, anything further?

Mr. HALL: Another point is that the record that they have sought to establish, they have sought to establish by parole evidence, and we contend it is incompetent for them to establish that record in that way; that the statute has provided a method for the restoration of records which the plaintiff has not pursued.

Mr. ROBINSON: That form particularly has been passed upon by the appellate court in this case.

The COURT: What is the volume?

Mr. ROBINSON: Vol. 55; Forsythe *vs.* Vehmeyer; page 224.

Mr. HALL: There is a case in the 65th Appellate, a recent
77 decision in which the appellate court has held, I think, that a record of this kind must be restored under the provisions of the statute; that a lost record must be restored under the provisions of the statute. That statute provided that an affidavit shall be presented to the court where the record is lost, and that service shall be had upon the parties in interest, and that they shall have opportunity to appear before the court and show what the record really was. Now, in this case there is this difficulty: We deny that the record was what they claim it was. We are compelled to try the two issues in this case as to what the record was, and then as to whether or not this defendant is liable. We contend strongly that the statute having made the provision for the restoration of records in a proceeding separate and apart from this suit, they must follow that case, as the statute has directed them to do so, and must give us an opportunity to make our showing as to what the record was.

The COURT: Any other point?

Mr. HALL: Then, when they have restored the record, they are in position to bring suit on the judgment, if there is any.

The COURT: Any other point?

Mr. HALL: I think that is all.

The COURT: Well, save your record.

To which ruling of the court defendant, by his counsel, then and there duly excepted.

78–80 And thereupon the defendant, to maintain the issues on his behalf, introduced the following evidence, to wit:

JACOB FORSYTHE, the defendant herein, being called and sworn on his own behalf, testified as follows:

Direct examination by Mr. HALL:

Q. What is your name?

A. Jacob Forsythe.

Q. You are the defendant in this case?

A. Yes, sir.

Q. Do you remember the trial of this case in the year 1871?

A. Yes, sir.

Q. Were you present at that trial?

A. I was present on the trial, but I had to go away to my train, as I lived in the country; I had to make my train, and I left before it was completed.

Q. Do you remember for what you were sued in that case?

Mr. ROBINSON: I object. This case is tryable by the record, your honor.

* * * * * * *

81 (Last question read by the reporter.)

The COURT: Just answer by yes or not; let him answer.

To which ruling of the court plaintiff, by his counsel, then and there duly excepted.

82–86 A. I was sued for.

The COURT: Answer the question, yes or no. Do you know for what you were sued in that case?

A. Yes, sir.

Q. Go on.

Mr. HALL: Upon what do you base your recollection as to what you were sued for at that time?

A. I have that account with Vehmeyer, which shows precisely what it was for.

Q. From a reference to that account could you, then, of your own independent recollection, state what Mr. Vehmeyer claimed upon that trial of the case?

Mr. ROBINSON: Wait a moment. I object to that. It will be no evidence in regard to what the records and proceedings in this case already was, filed in this case, for him to refer to the account between him and Mr. Vehmeyer; in other words, the witness is simply aiming to get back to testifying to his view of the original controversy.

The COURT: I sustain the objection.

To which ruling of the court defendant, by his counsel, then and there duly excepted.

* * * * * * *

87 Mr. HALL: Mr. Forsythe, you may state, if you recollect, what the testimony of Vehmeyer was as to his cause of action against you in that case.

Mr. ROBINSON: That is objected to.

The COURT: The objection is sustained.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. HALL: You may state whether or not at the time of the trial of this case or at the time the original suit was brought
88 against you by Vehmeyer, whether or not you had in your possession 200 cords of wood or more.

Mr. ROBINSON: That is objected to.

The COURT: The objection is sustained.

To which ruling of the court defendant, by his counsel, then and there duly excepted.

The COURT: I do not know but that we would shorten this considerably by your making an offer, would not it?

Mr. HALL: Perhaps so.

Mr. ROBINSON: I believe the best way would be to go on and ask questions.

Mr. HALL: I will have to make an offer again when I get through asking questions.

Q. Have you a statement in your possession made by Vehmeyer of his account against you as it stood prior to the trial of the case in 1871?

Mr. ROBINSON: That is objected to as immaterial.
The COURT: We had that question before, I think.
Mr. ROBINSON: Certainly.
The COURT: It is the same question that the witness referred to?
Mr. HALL: Yes.
The COURT: The same ruling.
Mr. HALL: He can answer whether or not he has that in his possession.
The COURT: He can answer yes or no.
Mr. HALL: You may answer that.

A. I have.
Q. Look at the document which I now hand you, dated Chicago, May 1st, 1869, purporting to be a statement of account, made
89 and signed by Henry Vehmeyer and addressed to J. Forsyth, and state whose signature is attached to that document.

Mr. ROBINSON: That is objected to as immaterial.
The COURT: Have you seen that account?
Mr. ROBINSON: No. I do not really care to. I do not care to go into the trial of this original suit any more. It is *res judicata.*
The COURT: I sustain the objection.
To which ruling of the court defendant, by his counsel, then and there duly excepted.
Mr. HALL: I asked him to identify the signature, so that I may offer it.
Mr. ROBINSON: That is objected to as immaterial.
The COURT: Let him do that. That is all right.
To which ruling of the court plaintiff, by his counsel, then and there duly excepted.
Mr. HALL: Where did you see that account?
Mr. ROBINSON: That is objected to as immaterial.
The COURT: He has got a right to save his record on it when he makes his record. How is he going to make his record on it—to save his point on it—unless he makes the preliminary proof?
Mr. ROBINSON: To save the objection, perhaps formally, I object to anything that is immaterial, irrelevant, and incompetent to this case.
The COURT: I think he should answer this question.
To which ruling of the court plaintiff, by his counsel, then and there duly excepted.

90 A. That was received by me at the post-office at Cassella, Indiana.
Mr. HALL: From whom did you receive it?

Mr. ROBINSON: That is objected to.

The COURT: How, in what way, did you receive it?
A. Through the post-office.
Mr. HALL (to the witness): Is the signature attached to it the signature of Henry Vehmeyer?

Mr. ROBINSON: That is immaterial.

The COURT: Objection overruled.

To which ruling of the court plaintiff, by his counsel, then and there duly excepted.

A. It is.

Mr. HALL: Can you state about when you received it?

Mr. ROBINSON: That is objected to as immaterial.

Objection overruled; to which ruling of the court plaintiff, by his counsel, then and there duly excepted.

A. No. I could not recollect the date that I received that. It is dated May 1st, 1869.

Mr. HALL: Did you receive it within a reasonable time thereafter?

A. Yes, sir.

Q. Did you have it in your possession prior to the bringing of the original suit against you?

A. I did.

Q. Had you any other statement of account from Mr. Vehmeyer prior to his bringing the original suit against you?

Mr. ROBINSON: That is objected to as immaterial.

The COURT: Well, I think I will let him answer the question.

To which ruling of the court plaintiff, by his counsel, then and there duly excepted.

A. I had a letter from him which contained statement of account.

91 Mr. HALL: Is this the last statement of account you received from Mr. Vehmeyer prior to his bringing the original suit against you?

Mr. ROBINSON: That is objected to as immaterial.

Objection overruled; to which ruling of the court plaintiff, by his counsel, then and there duly excepted.

A. Yes, sir; that is the last one.

Mr. HALL: Well, we will offer this in evidence.

(Paper here marked by the reporter Defendant's Exhibit 1 for identification.)

Mr. ROBINSON: We object to it as incompetent.

Objection sustained; to which ruling of the court defendant, by his counsel, then and there duly excepted.

Here insert Exhibit 1.

92 CHICAGO, *April 3d*, 1869.

Mr. Jacob Forsythe, Esq.

DEAR SIR: When I last saw you, you wanted me to write you about the land. I have not had a chance to sell it or to get a bid for it; do not think I can sell it for your price, $20. I would not want to take it for more than $500 on account for fear of nor getting my money out of it; would rather have $500, then the land; that is all I have to say about it. If you think it worth more, you will, of course, keep it.

Now, sir, if you intend to do right by me, you will pay me at once. I know you can do so if you want to. I have lost 16 (sixteen) months on your account, and I mean to do something by the first of May. You can pay me by the 15th of April; that will give me two weeks to look up something. If you had rather give me the land than the money, make out the deed at once and send it to me, with the abstract, in order to give me time to turn it into money by the first of May. I hope you can get more money for it than I can, for I'd rather have the money. Now, sir, do not undertake to put me off any longer; you know as well as I do how you treated me last year. I have not deserved such treatment from you as I have received lately, and you know it. I should never have sold any wood for you this winter (for I could have done better) if I had not expected to have received money enough from you to have
93 nearly, if not quite, paid me off. Instead, you have not given me half enough to pay for my time and labor. Everything I have done for you, sir, I have done as I would have for a brother or any one, and for you to go and send wood (which was sold to Giles) to parties here who were not expecting it, I really did not know what to make of that, unless it was that you were afraid to trust it to me for fear you would not get your money.

I tell you, sir, if you had sent ten cars instead of a few you would have got your money as well as you did for what you did send. I will here say to you, sir, the day you sent wood to Messrs. Norton & Johnson, that same day I knew all about it. Mr. Norton told me he had ordered two cars two weeks before he got the wood and had not expected to get any at all. I knew all this and more three days before I paid H. Roe $75.00. Most any one but me would have kept the money on account and not paid Harvey one cent on his order from you, but that is not my way of doing when any one is owing me. I want them to pay me if they are able; if not, I don't bother my head about them.

Defendant's Exhibit 1.

Now, then, sir, if you had told me you would not send Giles any more wood, but would give it to some one else, it would have made no difference to me, only this: when I sell a man a thing I always do as I agree to do, and never back out. Mr. Giles may think bad of me and think it my fault, the way he has been dealt with, but I could not help it. You may think by this that I am very much down on you, but that, sir, is not the case; but I do expect to see you come up like a man and do what is right. One question, and then I will stop: Is Mrs. C. M. Forsythe aware how much she and you owe me? A friend of yours told me yesterday that bills Mrs. Forsyth is owing she is prompt in having paid. That made me think she did not know as much as she ought to of my case. Hoping you will answer soon, I remain,

Yours truly,

(Signed) HENRY VEHMEYER.

Defendant's Exhibit 1.

94 Mr HALL: Look at the documents which I now hand you, dated Chicago, April 3rd, 1869, addressed to Mr. Jacob Forsythe and purporting to be signed by Henry Vehmeyer, and state whose signature is attached to it.

A. Henry Vehmeyer's.

Q. How did you come into possession of that letter, Mr. Forsythe?

A. Through the post-office.

Q. About when?

A. About the time it was dated, giving a reasonable time for delivery.

(Paper here marked Defendant's Exhibit 2 for identification.)

Mr. HALL: We will offer that in evidence.

Mr. ROBINSON: That is objected to.

The COURT: The objection is sustained.

To which ruling of the court defendant, by his counsel, then and there duly excepted.

Here insert Exhibit 2.

95 DEFENDANT'S EXHIBIT 2.

CHICAGO, *May 1st*, 1869.

Amount of grocer*ie* bills from April 15, 1866, to April 1, 1867	$338.61
$338.61 intrs., 2 years, 1 month, @ 6 p'r c. 6 12) 2031.66 — 1.69 2 4063.32 169	
$42.32	42.32
$51.46 from June 29th, '67, to August 21st, '67 6 12) 308.76 — 1 year, 8 months. 205 25.7	51.46
5.13	5.13
Total	$437.52

Amount to May 1st, 1869:

200 cords of wood @ 5.00, Dec. 5, '67.....	
Total cash for wood.....	923.40
Commission or profit on the wood to have been by Feb'y 1st, 1869.....	200.00
	$1,123.40
By cr.....	270.00
Bal*ls*...	853.40
15 months' interest @ 10 p. c.....	106.67
	$960.07
Grocer's amount.....	437.52
	1,397.59
Nov. 1, '68, by Iowa land.....	600.00
Bal*s*	797.59
By interest on the Iowa land for 6 months @ 10 p. c., from Nov. 1, '68, to May 1st, '69	30.00
	767.59
96 Dec. 30, 1869, by one car of wood on which was paid the freight, 7 cords, $6.00.	32.00
	$735.59

CR.

45 cords of wood @ 5.....	$225.00
Profit on	45.00
	270.00

97 Exhibit 2.

CHICAGO, *May 4th*, '69.

J. Forsyth, Esq.

SIR: Received yours of May 1, '69, this morning; have not seen Mr. Parks, but I have sent him word that you had written him. I have made your bill as small as I could. I think if I had made it smaller I would not be doing justice to myself. You certainly cannot find fault with it.

Yours truly, HENRY VEHMEYER.

(Over.)

In regard to the tax title which Mr. Gage has, I think there can be no mistake, as he has a deed from the sheriff and it is recorded; he paid 80 cents for 1863 taxes; he paid them in July, 1864. If you can send me the tax receipt, I can redeem what money I paid him for quitclaim deed.

H. V.

P. S.—Let me know what to do with the gas fixtures; I want to get rid of them as soon as possible. Send for the maps if you want them. There is a small package here which Mr. Hawkey left here for Mrs. Forsyth.

H. V.

Defendant's Exhibit 2.

Mr. HALL: Mr. Forsyth, the declaration in this case charges that the plaintiff advanced to you certain sums of money upon your promise to ship to him 200 cords of wood which it is stated you had in your possession at the time the money was paid by the
98 plaintiff to you. You may state whether or not, at the time the money is alleged to have been paid to you by Mr. Vehmeyer on account of this wood, you had 200 or more cords of wood in your possession.

Mr. ROBINSON: That is objected to.

Objection sustained; to which ruling of the court defendant, by his counsel, then and there duly excepted.

Mr. HALL: You may state whether or not Mr. Vehmeyer in his account against you, upon which suit was brought and judgment, as he claims, was recovered in the original suit, he charged you with the profit which he would have made upon the 200 cord- of wood in question.

Objected to by counsel for plaintiff. Objection sustained; to which ruling of the court defendant, by his counsel, then and there duly excepted.

Mr. HALL: I now offer to prove by this witness, your honor, that at the time of the alleged sale by him to Vehmeyer of the 200 cords of wood in question he, Forsythe, had more than 200 cords of wood in his possession, which he was ready and willing and able to deliver to Mr. Vehmeyer as the latter demanded, and that Mr. Vehmeyer, after a portion of this wood had been delivered, countermanded the order and requested *that* Mr. Forsyth not to ship any more wood, because it was difficult to get cars, etc., for the shipping of it. We offer to prove by this witness, further, that at the time this suit was originally brought by Vehmeyer against this defendant that Vehmeyer testified that he had an open account with Mr. Forsyth for groceries; that he had advanced him certain amounts of money on account of wood, and that he had credited Mr.
99 Forsyth with certain amounts of money paid by him on account; that he had charged Mr. Forsyth with a commission or profit on 200 cords of wood claims to have been sold to him, the sum of $200, being $1 per cord, and that after having made that charge against Mr. Forsyth he received from Mr. Forsythe and credited him with the sum of $600 on account; that this account was the only cause of action which Vehmeyer had or claimed to have against Forsythe at the time of the trial, and that Mr. Forsythe at the time of that trial testified that he, Vehmeyer, had ordered Forsythe not to ship any more wood after he, Forsythe, had shipped about 45 cords of wood.

Mr. ROBINSON: To which offer I object.

The COURT: Well, that's the same thing that we have had. I sustain the objection.

To which ruling of the court defendant, by his counsel, then and there duly excepted.

Mr. HALL: Mr. Forsythe, were you ever the petitioner in any bankruptcy proceeding under the national bankrupt law of America?

A. Yes, sir.

Q. When did those proceedings commence?

Mr. ROBINSON: You have a record of the bankruptcy. I think that is a thing you ought to produce.

Mr. HALL: I want to lay a foundation for it--this certified copy.

The COURT: Very well.

Mr. HALL: About when did those proceedings commence; can you remember?

Mr. ROBINSON: I object to that as not being properly proven. You cannot prove a record in that sort of a way.

100 Mr. HALL: This witness can state when he commenced bankruptcy proceedings.

Mr. ROBINSON: No; the record is the best evidence.

The COURT: Have you got the certified copy?

Mr. HALL: Yes.

The COURT: Ask him where his original discharge is.

Mr. HALL: Did you have an original discharge under the bankruptcy act?

A. I did.

Q. Where is it now?

A. I don't know.

Q. Have you made a search for it?

A. I have.

Q. Where have you searched?

A. Oh, I have searched through my house and also through the office.

Q. You have made search in every place it would — liable to be?

A. Yes, sir; liable to be; yes, sir.

Mr. HALL: We offer the certified copy.

Mr. ROBINSON: I will object to it formally. I do not know as I have any special objection to it as not being properly certified.

The COURT: When did you see your discharge last?

A. I saw it last when I gave it to Mr. Green—A. W. Green.

Q. When was that?

A. That was shortly after the commencement of this proceeding.

Mr. HALL: You never got it back from him?

A. I never did.

The COURT: Of course, the foundation is not laid for the introduction of this, if it is objected to.

Mr. ROBINSON: I object to it.

101 Mr. HALL: Did you ever make any inquiry of Mr. Green in regard to its whereabouts?

A. I did, and he said that he had had——

Mr. ROBINSON: I object to what Green told you; that's hearsay.

The COURT: Yes. That would not be competent.

Mr. HALL: Did you ask Mr. Green for it?

A. I did.

Q. Did you get it from Mr. Green?

A. No; not in my hand, but——

Mr. ROBINSON: Let him answer the question.

The WITNESS (continuing): Oh, what is that gentleman's name? I forget his name. It was Green.

Mr. MERRIFIELD: Robbins?

A. Robbins. Yes.

The COURT: Did Robbins have it?

A. He had it.

Mr. HALL: Robbins was your attorney in this case at one time, was he not?

A. Yes, sir.

Q. Was Mr. Robbins able to produce it?

Mr. ROBINSON: I do not think he testified about that.

Mr. HALL: Did you ask Robbins about it?

A. No; because the trial——

Mr. ROBINSON: Wait. Never mind the reason.

The WITNESS: The trial was on, or would be very shortly, and after that I went to California, then, and left it in the hands of my attorneys.

Mr. MERRIFIELD: I was going to ask what, if any, effort you made to get the discharge back from Robbins—what was the result of your efforts?

102 Mr. ROBINSON: Don't ask two questions at once.

Mr. MERRIFIELD: What effort did you make to get it from Robbins?

A. I did not ask him for it personally. My son asked him for it.

The COURT: Were you present at the time?

A. No. I was not.

The COURT: That would not be competent. The existence of a fact which seems to be in this case, Mr. Forsyth was discharged in bankruptcy. We ought not to have much delay from it, it seems to me.

Mr. ROBINSON: I would not particularly object to your honor admitting it over my objection.

The COURT: Well, let it go in.

To which ruling of the court plaintiff, by his counsel, then and there duly excepted.

Paper here marked by the reporter Defendant's Exhibit 3, and was and is in words and figures following, to wit:

Here insert Exhibit 3.

103 In the District Court of the United States, District of Indiana.

In the Matter of JACOB FORSYTH, Bankrupt. No. 3292.

At Indianapolis, in said district, before the Honorable Walter Q. Gresham, judge of said court, sitting as a court of bankruptcy, the proceeding following was had on the 30th day of December, A. D. 1880:

Whereas Jacob Forsyth has been duly adjudged a bankrupt under the act of Congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all requirements of law in that behalf, it is therefore ordered by the court that said Jacob Forsyth be forever discharged from all debts and claims which by said act are made provable against his estate and which existed on the 30th day of August, 1878, on which day the petition for adjudication was filed by him, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy.

Defendant's Exhibit 3.

104 DISTRICT OF INDIANA:

I, Noble C. Butler, clerk of the district court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete copy of an order made and entered in said court on the 30th day of December, 1880, in the matter of Jacob Forsyth, bankrupt, in bankruptcy, as fully as the same appears of record in my office.

Witness my hand and the seal of said court this 3rd day of February, 1897.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

DISTRICT OF INDIANA:

I, John H. Baker, judge of the district court of the United States for said district, do certify that at the date of the foregoing certificate Noble C. Butler was and now is the clerk of the district court of the United States for said district, and that his attestations aforesaid is in due form of law.

Witness my hand this 3rd day of February, 1897.

JOHN H. BAKER, *Judge.*

Defendant's Exhibit 3.

105 Mr. HALL: After the entry of this alleged judgment by Vehmeyer against you, what, if anything, happened to you personally?

Mr. ROBINSON: That is a pretty broad question.

The COURT: I suppose in connection with this suit. Let him answer.

To which ruling of the court plaintiff, by his counsel, then and there duly excepted.

A. I was arrested by a deputy sheriff on La Salle street.

Mr. HALL: What did the deputy sheriff do with you?

A. Took me to jail.

Q. In what case was that?

A. That was this case of Vehmeyer's.

Q. The case was tried in 1871?

A. Yes, sir.

Q. What proceedings, if any, did you take after your arrest?

Mr. ROBINSON: That is objected to (citing vol. 55, page 225, Ills. Reports). Mr. Frake resisted his right to be discharged, and while that question was pending he was admitted to bail under recognizance and allowed to go home. The date was very shortly before the big fire and before his appearance before that court. The case was permanently destroyed and never has been revived. That happened the night before, we say, that *ca. sa.* writ was issued upon which Mr. Forsyth was arrested. There is no issue under which he can introduce any evidence in defending this case by reason of anything that transpired in the county court. Mr. Forsythe has had a multitude of attorneys in this case—first, Robbins & Green, and then Tourtelette, and then this gentleman has succeeded
106 since. These attorneys have prepared their evidence with a great deal of care and all the skill they could command. They prepared the plea which is in the files of this case. I called that up before Judge Ewing, who considered it very carefully and sustained the demurrer to the plea, so that they stand today in precisely the same position they did before. They have got no pleas here. The question is saved upon the demurrer to the plea, if there be any question.

The COURT: Was this case before Judge Ewing?

Mr. HALL: Yes.

The COURT: How does it come to be on my call, then?

Mr. ROBINSON: It is on your docket. He sustained a demurrer to that plea, in which they sought to bring in this county-court matter, and they have no plea under which this evidence can be introduced.

Mr. MERRIFIELD: I think the demurrer to that plea was sustained, and that this evidence is admissible. We propose to show that the county court discharged this defendant.

The COURT: Does the defendant want this evidence?

Mr. HALL: Yes; I should think we should get this in. We contend that discharge in the county court is *res judicata* as to any element of fraud in the case.

Mr. ROBINSON: Well, that has been decided time and again.

The COURT: That proceeding in the county court which developed there with the rest was based on fraud.

Mr. HALL: No; we contend that Judge Wallace, after the hearing

of the case, ordered that he should schedule and allowed him to schedule, and he did schedule.

107 The COURT: Is it claimed anywhere that the arrest was on account of a judgment based on fraud?

Mr. HALL: As a matter of fact, we claim the arrest was made because Mr. Forsythe was a non-resident. He could have been arrested on any judgment had in any action on the case, but a judgment in an action on the case is not necessarily for fraud in fact.

The COURT: It did appear to be an action on the case.

Mr. HALL: No; but, assume that it was an action on the case, we claim that Judge Wallace, having decided that this defendant was entitled to schedule, must have decided that there was no fraud in the case.

The COURT: Do you admit it was an action on the case?

Mr. HALL: No; we don't admit that.

The COURT: If you go into that realm of irrelevant evidence, if it is irrelevant, it might let in evidence on the other side that you would not want, perhaps. I do not know whether you *you* would want to go into that or not, but you can do as you please.

(Last question read by reporter.)

Mr. MERRIFIELD: We purpose to show facts which would indicate what the record was.

Mr. HALL: It is an attempt on our part to restore the record.

108 The COURT: If you go into that and you claim that the proceedings in the county court released the defendant here from the claim that is made against him here——

Mr. MERRIFIELD: Not from the claim; from the debt; but that it was of such a nature as not to be exempt from the discharge.

The COURT: Would not it be competent for them to show by oral testimony what the nature of that claim was there, and would not then we have to open up the evidence in this case and try the merits of it? Would not we get there? Would not we get there? And if we got there, why the evidence of the defendant would be on his side that this was not an action on the case based on fraud and deceit, as shown by the record. *Q.* You can do as you have a mind to. I do not think you have any pleadings here that would justify it.

Mr. HALL: You would not object, I suppose, to my making an offer?

The COURT: Make any offer you please.

Mr. HALL: I will show by another record——

Mr. ROBINSON: I will grant you the records of the county court were destroyed. I won't put you to any trouble on that score.

Mr. HALL: If they were, I shall offer secondary evidence of the record.

Mr. ROBINSON: You must offer secondary evidence of record.

Mr. HALL: I intend to do that.

Mr. ROBINSON: I am going to insist upon the trial of this case that there is no plea here under which such evidence can be introduced.

109 The COURT: I do not think there is; make your offer.

Mr. HALL: I offer to prove by Jacob Forsythe that he was arrested under this proceeding; that he filed his petition in the county court before Judge Wallace, asking for leave to schedule in the case; that Judge Wallace granted him leave to schedule; that Mr. Forsythe's attorney, in the presence of counsel for Vehmeyer, at that time stated it would take some time to prepare a schedule; that Judge Wallace said, "Prepare your schedule and file it as soon as possible, and in the mean time you can give a bond that will protect this court on the condition that you shall file your schedule within reasonable time;" that Mr. Forsythe thereupon filed the schedule, with Mr. William Hansprough on his bond as a surety, the condition of which bond was that Mr. Forsythe should within a reasonable time file his schedule. Then Mr. Forsythe did prepare and file a certain schedule in the county court, and that he was discharged, and that nothing more was ever done with the account.

Mr. ROBINSON: That is objected to.

Mr. HALL: And that this proceeding was had in the county court more than 20 days prior to the Chicago fire on October 9th, 1871.

The COURT: Yes; the objection is sustained.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. HALL: On the former trial of this case Robert Clark Forsythe, the son of Mr. Forsythe, testified. The case was called before
110 your honor on the first call in January. Shortly thereafter I notified Mr. Robinson that we would have to take the deposition of Robert Clark Forsythe. It was difficult to get him, as he was out looking after mining property in Washington Territory, a great many miles away from railway stations, and we stipulated that his testimony given on the former trial should be taken in this case, and stipulation has been signed by the attorneys in this case.

Mr. ROBINSON: It is all objected to as immaterial in this case.

The COURT: Is it necessary to read that?

Mr. ROBINSON: What transpired in the court-room—what transpired before Judge Porter?

(Mr. Hall here reads deposition.)

(Here insert deposition.)

DEFENDANT'S EXHIBIT 4.

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court of Cook County.

HENRY F. T. VEHMEYER } Gen. No. 131,807.
vs.
JACOB FORSYTH. }

It is hereby stipulated and agreed by and between the parties hereto and their respective attorneys that upon the former
111 trial of said cause in the superior court of Cook county, Illi-

nois, in this court as case No. 131,807, the testimony of Robert C. Forsyth was given in behalf of said defendant; that said Robert C. Forsythe was upon the trial of said cause, as aforesaid, duly sworn and examined as a witness in said cause.

And whereas said Robert C. Forsyth has been absent from the city of Chicago for more than a year, and is now in British Columbia, in a region where it is impossible to take his deposition in this case, it is hereby further stipulated and agreed that the testimony of said Robert C. Forsyth, given by him at the trial of said cause before Judge John Barton Payne, may be read an- introduced in evidence in behalf of said defendant before his honor Jonas Hutchinson, one of the judges of said court, at the trial of said cause when reached on the present calendar, and that the same may be admitted upon the trial of said cause as the sworn testimony of said witness the same as though he were present in person and examined and allowed to testify upon said trial, but said plaintiff reserves the right to object to the competency of such testimony or any portion of it.

It is further stipulated and agreed that said testimony of said Robert C. Forsyth at said trial before said Judge Payne was and is as follows, to wit:

ROBERT C. FORSYTH, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

112 Direct examination by Mr. ROBBINS:

Q. What is your name?
A. Robert C. Forsyth.
Q. Are you the son of Jacob Forsyth, the defendant in this case?
A. Yes, sir.
Q. When was your hearing impaired—what year?
A. 1875.
Q. Do you remember anything about a suit brought before the fire by Mr. Vehmeyer here against your father?
A. Yes, sir.
Q. Were you present at the trial of that case?
A. I was; I was a witness.
Q. You were a witness?
A. Yes, sir.
Q. Was Mr. Forsyth a witness on that trial?
A. Yes, sir.
Q. Did you hear Mr. Forsyth testify?
A. No. I was too far away; I was back in court.
Q. Did you hear any of his testimony?
A. No, sir.
Q. Did you hear anything said by any of the witnesses on that trial about whether the wood was on hand or whether Mr. Vehmeyer had agreed to take it?

Objected to by plaintiff as leading.
The COURT: He can say yes or no to that.

A. Why, Vehmeyer——

Mr. ROBINSON: The question is whether you heard anything. Say yes or no.

A. On the stand?
Q. Yes, sir.
A. No, sir.
Q. You heard nothing on the stand?
A. Yes, sir.
Q. You mean you heard nothing while you were on the stand?
A. I didn't hear anybody testify on the stand. They were there, but I did not hear them.

113 Q. Now what did you hear about the trial?

The COURT: If he did not hear any evidence how would it be competent?

Mr. ROBBINS: Perhaps he might have heard the directions of the judge as to the character of the judgment.

The WITNESS: Yes, sir; I heard that.

Q. What did you hear?
A. I heard when the jury came in from the jury-room and returned their verdict; I heard the judge and the lawyer for the plaintiff argue about the character of the judgment.

Mr. ROBINSON: I move to strike that out.

The WITNESS: The plaintiff wanted the judgment for fraud as well as for the amount of the indebtedness, and the judge would not allow that, as there had not been any fraud proven.

Mr. ROBBINS: That was what the judge said?

A. That was what the judge said, as Vehmeyer had declined to take any more wood; he was getting wood at the time and he declined to take any more——

Objected to by plaintiff.

Q. Are you stating what the judge said?
A. Yes, sir; that is what the judge said.
Q. What reason did the judge give for not allowing a judgment for fraud?

Objected to by plaintiff.

The COURT: Well, what did the judge say?
A. He said there had been no fraud proven.
Q. Did he say anything else about why there had been no fraud proven?
A. Yes, sir.
Q. What did he say about that?
A. He said Vehmeyer had been getting the wood and had refused to take any more.

114 Q. Do you know of your father having been arrested on this judgment?
A. Yes, sir.
Q. Do you know of any proceedings in the county court?
A. Yes, sir; he scheduled.

Q. He scheduled?
—. Yes, sir.
Q. State all you know about the proceedings in the county court.
A. Well, he was up in court and scheduled and the attorney for Vehmeyer objected.
Q. Objected to what?
A. Objected to his scheduling, and I did not hear just exactly what the argument was, but the judge overruled it.
Q. Overruled the plaintiff's attorney?
A. Overruled the plaintiff's attorney and allowed him to schedule.
Q. Do you remember what judge that was?
A. No; I don't.
Q. Do you remember whether any schedules were filed or not?
A. Yes, sir; there was a schedule made.
Q. There was a schedule made by whom?
A. By my father.
Q. What happened after the schedule was made, or after the judge made this decision?

Objected to by plaintiff. Objection overruled.

Q. After this decision of the county court that your father should schedule, did your father go free from the arrest?
A. Yes, sir.
Q. Did you testify in that case you say?
A. Yes, sir.
Q. What did you testify to?

Objected to by plaintiff.
The COURT: If he remembers he may state.
Mr. ROBINSON: Does your question mean what did he say in his testimony?
Mr. ROBBINS: Yes, sir.

Q. What did you testify to on the stand?
115 A. To the amount of the wood being on hand and the fact that Vehmeyer had declined to take any more; that he told me that he didn't need any more.
Q. You testified that Vehmeyer had told you that he did not want any more wood?
A. Yes, sir.
Q. That was before Judge Porter?
A. Before Judge Porter.

Cross-examination by Mr. ROBINSON:

Q. How old are you now?
A. 43.
Q. What was your age in 1871?
A. 20 years old.
Q. What were you doing—what was your business then?
A. I wasn't doing much of anything. I was living in Huntington, on a farm.

Q. Did you do anything at all?
A. No, sir.
Q. Didn't occupy yourself with anything?
A. No, sir; nothing special.
Q. Are you quite sure that you were present at this trial of this case of Vehmeyer against Forsyth?
A. O, yes, sir.
Q. Where did it take place?
A. It took place here at the old court-house.
Q. Do you recollect what room?
A. In the superior court.
Q. What room in the superior court? How did you happen to be present?
A. I was a witness.
Q. Who requested you to be present as a witness?
A. My father.
Q. Now, you say that you did not hear any testimony of the other witness?
A. No, sir.
Q. Did you hear what took place on the stand?
A. No, sir.
Q. Did not hear what took place on the stand?
A. No, sir.
Q. Where were you at that time?
A. I was in the court, but I was in the far end of the room, away off from the witness stand.
116 Q. Do you recollect seeing Vehmeyer testify?
A. I saw him on the stand, but did not hear what he said.
Q. Do you recollect seeing Marshall testify?
A. I saw him on the stand.
Q. Do you remember seeing Eldridge testifying on the stand?
A. I could not say.
Q. Did they testify before or after you were called? Had you finished your own testimony before you went off to the far corner?
A. I was the last witness upon the stand.
Q. You think you was the last witness on the stand?
A. Yes, sir.
Q. You say you heard the judge talking. Was that after the jury came in?
A. That was after the jury came in.
Q. Were the jury there in the box, or were they in their seats or standing before him, or where were the jury?
A. The jury were in their seats.
Q. Do you remember whether there was any motion for a new trial?
A. No, sir; I did not hear any motion for a new trial.
Q. Were you ever present in the court-room after that time when this case was under consideration?
A. Not after that.
Q. Now, about this schedule, who made the schedule?
A. My father made it.

Q. Where was he when he made it?
A. I could not say. I saw the paper; I saw the statement.
Q. Did you see him make it?
—. It was his schedule; yes, sir.
Q. Did you see him make it?
A. I saw him make part of it; yes, sir.
Q. What part of it did you see him make?
A. Well, I could not tell you.
Q. Who made the other part of it?
A. Oh, he made it.
117 Q. Did you see him do it?
A. I saw him make part of it.
Q. Where did you see him make that part of it?
A. I could not tell you where.
Q. Did you read it?
—. I read a little of it.
Q. How did that happen?
A. I was looking over his shoulder.
Q. And you say you can't tell where your father was when he made it?
A. No.
Q. Did your father write it out?
A. Yes, sir.
Q. Anybody assist him—anybody help him?
A. Yes, sir; the attorney.
Q. What attorney?
A. I don't remember.
Q. How did the attorney assist him?
—. He drew up the schedule.
Q. I thought you said your father drew up the schedule?
A. The attorney drew up the schedule and he gave him the date to make it out.
Q. Was this in the court-room or was it somewhere else.
A. I could not tell where it was.
Q. Were you present in court when the bond was given?
—. No, sir.
Q. Were you present in the court at that time?
A. No, sir.
Q. Were you present in the court at any time when this matter was up?
A. Yes, sir.
Q. And you say no bond was given at the time you were present in court?
A. At the time of making the schedule.
Q. I did not ask that; I ask you if you were present in court when your father was told he might go?
A. Yes, sir.
Q. Was the schedule made in the court-room?
A. The schedule was on file; yes, sir.
Q. Did you read the schedule?
A. Part of it.

118 Q. Do you know whether that was a schedule or whether it was a petition made by your father to the judge of the county court?

A. A what?

Q. A petition for leave to schedule.

A. It was a schedule.

Q. How much of it did you read?

A. Well, I could not tell you.

Q. What do you remember of it?

A. I remember it was a schedule.

Q. You have said so three or four times, but I could tell best if I could have you state what it was that you read.

A. I don't remember.

Q. What was it you read in that paper?

A. I don't remember.

Redirect examination by Mr. ROBBINS:

Q. Where were you when you heard the judge discuss the question?

A. I was on the witness chair.

Q. When he discussed as to what kind of a judgment should be entered?

A. Yes, sir.

April 7, 1897.

THOS. J. MERRIFIELD AND
ROBERT S. HALL,
Att'ys for Def't J. Forsyth.

M. W. ROBINSON,
Att'y for Plaintiff.

119 Superior Court.

VEHMEYER
vs.
FORSYTH. } 131,807.

Stipulation as to Testimony of Robert C. Forsyth.

120 The COURT: When was that evidence admitted?

Mr. HALL: In 1894; the case was tried before Judge Payne. This is gotten up by the reporter, this transcript, by the reporter who took the case at that time, as the record.

Mr. MERRIFIELD: We will show that Judge Payne admitted it.

Mr. ROBINSON: We tried it on a different basis at that time; that part of the case was all erroneous.

Mr. HALL: The record in the other case shows this evidence was admitted by Judge Payne at that time.

The COURT: On what ground was that admitted; did you go into it?

Mr. ROBINSON: Yes; it was a mistake, though.

The COURT: I concede the defendant has got the right to meet and overcome any case that the plaintiff makes against him.

Mr. ROBINSON: I happened to take the view at that time that perhaps it was proper and correct to introduce testimony showing what the nature of the evidence on the former trial was.

The COURT: But, according to the view I have taken of it here, that evidence would not be competent.

Mr. MERRIFIELD: I was not present at the time, but I think it was admitted on the ground that the declaration as proven did not clearly show what the real subject of litigation was.

Mr. ROBINSON: No; it was admitted on the ground that we had gone into the nature of the testimony. I started it off on a sort of a theory that I would show not only the issues, but there was evidence introduced that tended to sustain the issues. It was a mistaken view of the law.

121 The COURT: If you do that, you have got to try that case all over again. If the case is in judgment, if that was a judgment in assumpsit, or a judgment in tort, why that is the question in this case here, to find out what kind of a judgment that was. There certainly were issues joined in that case, and a trial, on which trial evidence pro and con and the merits of the case were gone into, and it was merged in the judgment. Now, it does seem to me the only inquiry is here as to what kind of a judgment it was. If the judgment was in assumpsit, why this is barred by the discharge in bankruptcy. Now, if it is a judgment in tort for fraud, it is perhaps also barred by the discharge in bankruptcy; I won't undertake now to say that it is not. Have you more evidence, Mr. Hall?

Mr. HALL: Yes, as to the proceedings in the county court, I had intended to offer the evidence of Edward Longly, who was the deputy sheriff and had Mr. Forsythe in charge. Now, I offer to prove that Mr. Longley took Mr. Forsythe from the jail, where he was confined under this proceeding, and brought him into the court before Judge Wallace under an application to schedule, and by Judge Wallace did grant leave to schedule.

Mr. ROBINSON: You mean to prove the record by Longley?

Mr. HALL: I offer further to prove by Mr. Longley that Mr. Forsythe, after the hearing in the county court, was discharged, and that he let him go free. That is all of Mr. Longley.

Mr. ROBINSON: That is objected to. It is not the evidence of record and it is not in this case.

The COURT: I will sustain that.

To which ruling of the court defendant, by his counsel, then and there duly excepted.

122 Mr. HALL: I intended to corroborate that testimony so far as possible by Mr. Hansporough, who signed the bond. I offer to prove by William Hansporough that at the time Mr. Forsythe made his application to schedule——

Mr. ROBINSON: Bring in Mr. Hansporough.

WILLIAM HANSBROUGH, a witness of lawful age, having been called and sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. HALL:

Q. What is your name?
A. William Hansbrough.
Q. Do you know the parties to this suit?
A. Yes; I know Mr. Forsythe. I don't know Mr. Vehmeyer.
Q. Were you present in the county court in the month of August, 1871, when Mr. Forsythe was present in the custody of the sheriff?
A. I do not pretend to be accurate as to the date at all. At the time Mr. Forsythe was arrested I was present and gave a bond which was required from him in his making the schedule. I think it was upon the giving of that bond that the defendant, Mr. Forsythe, was discharged. I had no further business with him.
Q. What case was that in?
A. A suit of Vehmeyer's against Mr. Forsythe, in which suit he had obtained a judgment against Mr. Forsythe, and he had
123 been arrested, and it was *that* the giving of that bond that procured his release or satisfaction.
Q. Do you know whether or not Judge Wallace at that application decided the question as to whether or not Mr. Forsythe could schedule?

Mr. ROBINSON: That is objected to. That is not the way to prove the proceedings of court.
Mr. HALL: That, of course, would be in open court. The ruling of the court is open here.
Mr. ROBINSON: I object for other reasons.
The COURT: What are the other reasons?
Mr. ROBINSON: The other reason is that it is not of the issues of this case.
The COURT: It is not admissible under the pleadings?
Mr. ROBINSON: No.
The COURT: That applies, as I understood it, to all that *all that* took place in the county court; and did he pass on that question?
Mr. HALL: We will ask first if you remember what the condition of that bond was?
A. I do not know that; I do not know. I do not know what you mean by conditions.
Mr. ROBINSON: The words, the provisions, the thing- that were contained in the bond itself.
A. I don't recall what was contained in it. I know the result of it; Mr. Forsythe was to make a schedule.

Mr. ROBINSON: Wait. You are going entirely out of your element.
The COURT: What else is there?
Mr. HALL: I will offer to prove——
The COURT: Better ask the question.
124 Mr. HALL: I offer to prove now that Judge Wallace did discharge this defendant.
Mr. ROBINSON: And that he heard Judge Wallace say something.

Mr. HALL: Yes; that he heard Judge Wallace decide that Mr. Forsythe was entitled to schedule.

Mr. ROBINSON: This is objected to.

The objection sustained; to which ruling of the court defendant, by his counsel, then and there duly excepted.

Mr. HALL: Do you know why you signed that bond?

Mr. ROBINSON: Wait a moment; I object to that.

Objection sustained; to which ruling of the court defendant, by his counsel, then and there duly excepted.

Mr. HALL: Do you know why bond is required?

Mr. ROBINSON: I object to that.

The COURT: You can answer that by yes or no.

A. It was.

Mr. ROBINSON: Do you know—yes or no—why bond is required at all?

A. Yes.

Mr. HALL: Now, why?

Mr. ROBINSON: I object.

The COURT: As I understand, the position taken is that no evidence is competent about what took place in the county court, because here are no pleadings under which it would come in. It seems to be so. I do not see how evidence is competent, under pleadings as they stand, of what was done there.

125 Cross-examination by Mr. ROBINSON:

Q. Who asked you to go to the court-house to sign the bond?

A. Mr. Forsythe himself.

Q. Do you know what a recognizance is?

A. It means——

Q. Do you know what a recognizance is?

A. I was going to give you my idea. I do not know that I can give you the legal definition of it.

Q. Do you know what a bail bond is, where a party under arrest enteres into a recognizance, with certain surety, upon which he is allowed to go? Do you know what that is?

A. That means he is to be free upon the condition named in the bond.

Q. Do you recollect the amount of the bond?

A. I do not; it seems to me some $500.

Q. Do you know what the conditions of that bond were? Did you read it at the time, so as to know what the conditions were?

A. That he was to schedule.

Q. Do you know—do you now have a recollection of what the conditions were that were contained in that bond?

A. I would like to answer as well as I know how.

Q. The first thing I want to know is whether you know what the condition of the bond was.

A. I know the result of the bond.

Q. That is not the question. Do you know what was contained in the bond, the conditions of that bond—the conditions of your bond, which stated that whereas, etc.—if you know anything that was contained there?

A. I know that that bond required him to do certain things
126 within a given time; that is my understanding of it distinctly.

Q. It is your understanding of it by a subsequent conversation with Forsythe?

A. No, sir.

Q. The result was, Forsythe was released from arrest that time?

A. Yes, sir.

Q. And that is what the bond is given for, the recognizance, with you as surety?

A. Yes, sir.

Q. Do you recollect to what time that case -as continued?

A. No; I do not remember.

Q. You do not remember any of the continuances?

A. No, sir.

Mr. ROBINSON: That is all.

Whereupon court adjourned till 2 o'clock p. m.

2 P. M.

Court met pursuant to adjournment.
Same parties present.

JOHN MARSHALL, a witness of lawful age, being first duly called and sworn, testified as follows:

Direct examination by Mr. HALL:

Q. What is your name?

A. John Marshall.

Q. Where do you live, Mr. Marshall?

A. 5152 Emerald avenue.

Q. What was your business in the year 1871?

A. In 1871, I was in the Union stock yards—working in the Union stock yards.

127 Q. What was your business and employment in the years 1869 and 1870?

A. I was foreman out in Indiana.

Q. In whose employ were you in the years 1869 and '70?

A. Jacob Forsythe.

Q. The defendant in this case?

A. Yes, sir.

Q. Do you remember the case of Henry F. P. Vehmeyer against Jacob Forsythe, tried in the year 1871?

A. Yes, sir.

Q. Were you a witness in that case?

A. I was.

Q. In whose behalf?
A. Jacob Forsythe, I believe.
Q. Do you remember what your testimony was on the trial of that case?
A. I do not remember the evidence.
Q. Do you remember a part of it?
A. I remember some of it; yes, sir.
Q. What part of it do you remember?

Mr. ROBBINS: I object now.
The COURT: That will be the same question we had before. I sustain the objection.
To which ruling of the court defendant, by his counsel, then and there duly excepted.
Mr. HALL: I will offer to prove, then, as we have in the other cases, by this witness that he was a witness on behalf of Jacob Forsythe on the former trial of the case, and that in relation to the 200 cords of wood in question this witness testified that Mr. Forsythe did have that amount of cord-wood and more for a long time prior to this lawsuit, and at the time Vehmeyer wanted it or claims to have wanted it, and that he heard Vehmeyer swear on the trial of that case that he, Vehmeyer, had ordered Mr. Forsythe not to ship
128 any more of the wood; that Vehmeyer instructed this witness at Castell, Indiana, that he should not ship any more wood to Vehmeyer on account of Forsythe, and that this witness was then handling and cutting wood for Forsythe in the woods. That is all.
Mr. ROBINSON: I object to that offer, your honor; it is utterly unconscionable.
The COURT: The objection is sustained.
To which ruling of the court defendant, by his counsel, then and there duly excepted.

Mr. ROBINSON: Were you not called as a witness on behalf of the plaintiff Vehmeyer on the trial of the original case?
A. I could not say that I was, sir, and I could not say that I was not.

The COURT: I want to know who this witness testified for.
Mr. HALL: I offered to ask him those questions.
The COURT: I understood this witness to testify that he testified for the plaintiff on the trial of the original case.
Mr. ROBINSON: He did.
The COURT: And did not testify for the defendant?
Mr. FAKE: Yes.
The COURT: Now, I understand that he testified for the defendant on the original trial.
Mr. ROBINSON (to the witness): Did you so testify?
The COURT: He says he don't remember a part of his evidence, but he remembers a part. (To Mr. Hall:) I understand you to say this witness testified on behalf of the plaintiff in the original trial of this case?
Mr. ROBINSON: He did.

129 The COURT: Then this court becomes interested in that question, whether this witness testified for the plaintiff on the trial of that case. I want to know what the fact is—not what he testified to, but whom he testified for?

Mr. ROBINSON (to the witness): The question was, Were you not called as a witness on the part of the plaintiff Vehmeyer on the trial of the original suit in 1871?

A. Yes; I believe I was; I believe I was.

The COURT: Well, were you called? Did you testify then for the defendant; did you testify for Forsythe then?

A. No, sir.

Q. You testified for Vehmeyer, didn't you?

A. Yes, sir.

Q. You testified for the plaintiff?

A. Yes, sir; that is right.

Q. How did you happen to say you testified for Forsythe?

A. Before Judge Payne.

The COURT: Did he testify before Judge Payne?

Mr. ROBINSON: He was called by the defendant before Judge Payne.

The COURT: Oh, well, that is all right.

Mr. FRAKE: Then these offers *is* all wrong?

Mr. HALL: No.

Mr. ROBINSON: Let everything stand as it goes in. I am satisfied with the record.

130 S. J. HARMON, a witness of lawful age, being first called and duly sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. HALL:

Q. Have you been sworn?

A. Yes, sir.

Q. What is your name?

A. Samuel J. Harmon.

Q. What was your business in 1871?

A. I was with with Kinney, Peck & King.

Q. What business were they in?

A. The law business.

Q. Do you remember the trial of a case of Henry F. P. Vehmeyer against Forsythe in that year?

A. I do, sir; part of it.

Q. Do you know who the attorneys for the parties to that suit were?

A. Mr. Robinson and Mr. Frake and Mr. Peck and Mr. King.

Q. Who did Mr. Peck and Mr. King represent?

A. Represented Mr. Forsythe.

Q. Were you present at the trial of that case?

A. Part of it, sir.

Q. Before what judge was it tried?

A. Porter.

Q. Was it tried by court or by jury?
A. By jury.
Q. At what part of the trial were you present?
A. Well, I was back and forwards from the office off and on.
Q. Were you present at the time the jury brought in its verdict in the case?
A. I was there part of the time; yes, sir.
Q. Part of the time?
A. Yes, sir.
Q. Do you remember whether or not the jury at any time after it had gone out asked the court for further instructions in the case?

Mr. ROBINSON: Wait a moment. We object. It is not the
131 right sort of evidence to prove anything that transpired—to prove any proceeding in court—the recollections of a by-stander.

Mr. HALL: It is a part of the record, and it is an item from which this court may decide what the character of that case was, and may decide whether or not the element of fraud was involved in the case. We contend that this court has a right to go into the facts that will enable him to find out what the true facts in that case were, because the record that they attempt to show the court does not show in so many words fraud upon its face.

The COURT: Well, it is the same thing we have had before; just the same thing we have had before.

Mr. ROBINSON: Certainly; trying to retry that case.

The COURT: It is the same thing, it strikes me, and I will have to rule the same as I did on all of them and sustain the objection.

To which ruling of the court defendant, by his counsel, then and there duly excepted.

Mr. HALL: Will your honor allow the witness to answer the question subject to the objection instead of my making an offer? It will amount to the same thing.

Mr. ROBINSON: No; I object to it.

The COURT: That would be irregular. There are only the two ways of getting at it—ask the question and let the court rule on them, or make your offer as a whole.

Mr. HALL: I offer to show by this witness that after the jury had retired, on the original trial of this case, that they came out and asked the court as to whether or not they could find there was fraud
132 involved in the case, and that Judge Porter then instructed the jury that no fraud had been shown in the case, and that it was the duty of the jury simply to determine the amount, if any, which Forsythe owed to Vehmeyer.

Mr. ROBINSON: That offer is so utterly at variance with every experience and conception of how things transpired in the court-room I should feel inclined to object to any such offer as being such a monstrous perversion of the truth as not to be heard, even as an offer.

Mr. HALL: I offer to prove it by this witness.

Mr. ROBINSON: One of the objections is that this gentleman

frames anything in his mind as an offer. Of course, there is no jury to be affected. I do not think it will affect this court. I am sometimes pained in hearing his offers made up, thinking of what I know to be the facts in the case. That jury went back to get a piece of evidence that had been offered on the trial. After they got that evidence, they finished up their verdict in about two minutes. Everybody knows that the jury did not come back for further instruction, and even the court knows that the court would never venture to give that jury any instructions except in writing. It is so utterly wild-cat and preposte-ous, that offer.

The COURT: If that is received in evidence, we have got to go to what you suggest as counter to it, and a good many things, it seems to me, are incompetent in this case. It seems to me this case narrows itself down to just two questions and only two questions in it, and one is, What is the record? The other is, What is the effect on that record of that finding of a discharge in bankruptcy? Are not those the only two questions here?

Mr. HALL: Yes.

Mr. ROBINSON: It was only a trial on the record.

133 The COURT: I will sustain the objection to the offer and save your point.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

MARSHALL WAITE, a witness of lawful age, being first duly called and sworn on the part of the defendant, testified as follows:

Direct examination by Mr. HALL:

Q. What is your name?

A. My name is Marshall Waite.

Q. What is your business?

A. I am in the employ of the Title Guarantee and Trust Co. My part of the business is taking charge of judgment books.

Q. How long have you been employed in that capacity?

A. I entered the employ in 1869, and I have been with them and their successors, now the Title Guarantee and Trust Co., ever since. I have had charge of the judgment books most of the time. At intervals I have been out of work.

Q. Have you in your possession a judgment record from memoranda in the possession of Shortall & Howard covering the period of 1871?

A. I have.

Q. Is this the book?

A. This is the book.

Q. Will you refer to it, please? Have you got a record in that book relative to the case of Henry F. P. Vehmeyer against Jacob Forsythe?

Mr. ROBINSON: I object to that record.

Mr. HALL: I will use the word memorandum.

A. Yes, sir.

134 Q. When was that record or memorandum made?

A. Well, it was made at different times. I should explain that perhaps we took off the new suits every day, as they are filed at the time, and they are entered in our books here, the general number, the title of case, and afterwards the date of filing and such orders as they enter in the case we take at the time they are entered, so this entry is, of course, doubled; the title at the date of filing case, July 16th, 1870; then there is an entry of judgment on July 29th, '71.

Q. That was, of course, made at the time of the entry of judgment, and then the issuing of the execution on August 19th, '71, made on that date. Was the entire entry made out there at seperate times? Are there any other orders or memorandum by you upon that book with reference to this case?

A. Not in reference to this case.

Q. And is there any memoranda as to the character of the case? From the statement of the action in the column where the entry of the action or kind of case, what is that?

A. It is assumpsit.

Q. What does that record show as to the amount of the judgment?

A. It shows judgment, $833.35.

Q. Does your record show the number of the case?

A. It does.

Q. What is the number?

A. General number, 31053.

Q. And what court does it show that case in?

A. The superior court of Chicago.

Mr. HALL: If the court please, we offer that in evidence. I have had a copy of that record made, which is similar to the one offered by Mr. Robinson and made, I think, in the same handwriting. I offer it upon the same basis as Mr. Robinson made his offer.

Mr. ROBINSON: I suppose that would be fair in this case.

(Paper here marked by reporter Defendant's Exhibit 5, and was and is in words and figures following, to wit:)

Here insert Exhibit 5.

135

"EXHIBIT 5."

Superior Court of Chicago.

No. of case.	Name of parties.	Action.	When commenced.	Date of judgment.	Against whom.	Amount of judgment.	Record.	Fee book.	No. of execution.	Date of execution.
			July 16, 1870							
31,053	Henry F. T. Vehmeyer *vs.* Jacob Forsyth.	Assumpsit.		July 29, '71	Appeal allowed.	833 35		40,549	16,963	Aug. 19, 1871

136 STATE OF ILLINOIS, } ss:
County of Cook, }

Henry H. Handy, being first duly sworn, on oath states that the writing hereto attached is a true copy from a judgment docket formerly belonging to Shortall & Howard; that the minutes and extracts contained in said judgment docket were made from the records and files in the office of the clerk of the superior court of Cook county, Illinois, prior to the destruction of the records of Cook county, Illinois, which occurred on or about October 8 and 9, 1871; that said judgment docket containing said minutes and extracts was at the said date of the destruction of said records in the possession of persons who were then engaged in the business of making abstracts of title for others for hire, and that the said judgment docket containing the minutes and extracts from which the said copy is made is now in the possession of the Title Guarantee and Trust Company, of the abstract department of which company affiant is the manager.

HENRY H. HANDY.

Subscribed and sworn to before me this fifteenth day of June, A. D. 1897.

MAGNUS O. BENSON,
[SEAL.] *Notary Public, Cook County, Illinois.*

137 Mr. HALL: I will ask you, Mr. Waite, whether this transcript which we offer is a true and correct transcript of the entries made upon the book from which you are now testifying?

A. It is.

Q. Will you identify the original book of records here by number?

A. It is judgment docket No. 10 of the superior court.

Q. Whose property is that now?

A. The Title Guarantee & Trust Co.'s.

Q. And whose was it at the time those entries were made?

A. Shortall & Hoard's.

Cross-examination by Mr. ROBINSON:

Q. You did not mean this to be a judgment docket of the superior court?

A. No, sir.

Q. What did you mean?

A. I mean docket No. 10 of records, kept by Shortall & Hoard, of judgments in the superior court.

Q. You say that you made the entries of this book?

A. I made the entries of the judgment of the execution.

Q. I ask you did you make this entry in this book?

A. Not all of it.

Q. Did you make the entry of the number?

A. No, sir.

Q. Of the title of the case?
A. No, sir.
Q. Of the nature of the action?
A. No, sir.
Q. That is not made by you at all?
A. That is not made by me at all.
Q. What was your age in 1869?
A. In 1869—I was born in 1848; that would make me—I was just under 21.
Q. That was the beginning of your work in this line?
A. Yes, sir.
138 Q. Did you work at this work in 1869?
A. I think I begun with Shortall & Hoard in 1867 instead of 1869.
Q. I mean this work of abstracting court matters.
A. I was working at the time that the entry of that judgment was made, at the time this suit was filed here; when that suit was entered in, not in my handwriting; I was not working at the judgments then.
Q. At the time of the entry of the number of the case, the entitlement of the case and the nature of this case, you were not working at this work at all?
A. Not that part of the abstract business.

Redirect examination by Mr. HALL:

Q. Do you know in whose handwriting the number and title of the case and the character of it was made?
A. They were made by a gentleman by the name of Dearborn, who took my place for a few months and then left us. I don't know where Mr. Dearborn is now.
Q. Do you know that to be his handwriting?
A. I know that to be his handwriting.
Q. And his duties in respect to the records where the same is yours?

Mr. ROBINSON: Wait a moment. This comparison I object to. What were his duties in respect to this record?
A. They employed him; he was employed by Shortall & Hoard, with whom I was employed, and I instructed him in his work, and I know what his duties were, the same as those I testified to as being my own duties when I was doing that work.

139 Mr. HALL: Now, if the court please, I desire to offer in evidence sections 5117 of the bankruptcy act of the United States; also sec. 5119 and also sec. 5067. I have a correct transcript of those sections, if the court desires to see them.
The COURT: Well, you might let me take them. Sec. 5117, 5119, and 5067?
Mr. HALL: Yes; and I will hand those up to the court with the other propositions of law.

Whereupon defendant rested his case.

And the plaintiff, to further maintain the issues on his part, in rebuttal offered the following testimony, to wit:

JAMES FRAKE, a witness in rebuttal on behalf of the plaintiff, testified as follows:

Direct examination by Mr. ROBINSON:

Q. You have already testified in this case?
A. I have.
Q. Did you hear the testimony of Mr. Hansbrough offered on behalf of the defendant?
A. I did.
Q. Were you present at the time of the filing of the bond in regard to which he testified?
A. I was.
Q. Do you know what that instrument was and what it contained?
A. I do.
Q. What was it?
A. It was a recognizance for the appearance of Mr. Jacob Forsythe on the 12th day of October, 1871, and only that.
Q. He spoke of Mr. Forsythe being discharged. Was he discharged except upon that recognizance?
A. That was all.
140 Q. At what time was this case continued—to what time was the recognizance?
A. To the 12th day of October, 1891.
Q. You don't mean 1891?
A. 1871.
Q. The 12th day of October, 1871?
A. Yes; the Wednesday after the fire.
Q. Was there anything referring to a schedule or scheduling contained in that recognizance?
A. Nothing whatever.
Q. No reference to a schedule contained in the recognizance?
A. No, sir.

Cross-examination by Mr. HALL:

Q. When was Mr. Forsythe arrested?
A. About the middle or latter part of September, 1871.
Q. Didn't you state in your direct examination it was in August?
A. No, sir; I did not.
Q. You did not?
A. No, sir; I did not. At least I did not intend to. I said the writ was issued.
Q. Do you remember when the writ issued?
A. I told you in my former evidence that it issued somewhere toward the middle of August.
Q. Now, how long after that was it before Mr. Forsythe was arrested?
A. It was sometime after that.
Q. How long?

A. Well, I should say a month afterwards.
Q. A month afterwards?
A. Or perhaps a little more than a month.
Q. That would bring it to the latter part of September?
A. Yes, sir.
Q. Of 1871?
A. Yes, sir; the latter part.
Q. How long after Mr. Forsythe was arrested on this alleged writ was it before he went into the county court and asked for his discharge?

A. He went in the next morning.
141 Q. The next morning?
A. Yes; I think; my remembrance is that he staid in jail one night.
Q. That is, as you recollect it, he was discharged the latter part of September?
A. He was not discharged at all.
Q. He filed this bond you mentioned the latter part of September?
A. Yes.
Q. What was the condition of that bond?
A. That he should appear on the 12th day of October, 1871, at an hour fixed in the bond, and the question of his right to schedule was then to be heard, he claiming right to schedule and I denying his having the right to schedule.
Q. Was there any hearing on the petition the first time Mr. Forsythe went in?
A. No hearing whatever.

Mr. HALL: That is all.

The COURT: When was it that he was to appear?
A. The Wednesday after the fire, in 1871.
Mr. ROBINSON: I wish to ask one or two questions more of this witness.
Q. Have you made a computation or a calculation of the interest upon that judgment?
A. I have.

Mr. HALL: I object to that.
Mr. ROBINSON: It is a mere statement of computation.
Mr. HALL: This is a part of his original case.
The COURT: No; it is not a part of his case. They never interpose any objection to that kind of evidence which is of any assistance to the court. The court or jury may take any computation for what it is worth; they are not bound by it. You may tell if you made a computation.
To which ruling of the court defendant, by his counsel, then and there duly excepted.

142 The WITNESS: I computed the interest on the judgment from July 29th, 1871, to the first day of July, 1893, at six per cent.
Mr. ROBINSON: Do you mean 1893?

A. 1873—no, 1893; that is what I mean.

The COURT: July 29th, 1871.

A. To July 1st, 1893, at 6 per cent.; that amounts to $995.80. I computed the interest from July 1st, 1893, under the original judgment, to the present time——

The COURT (interrupting): What do you mean, $995.80? You do not mean that that is the amount?

A. No; I did not.

The COURT: That is simply the interest?

A. That is simply the interest; I computed the interest on the judgment from July 1st, 1893, to the present time, at 5%. That amounts to $246.94, the original judgment being $833.35, making a total of $2,076.90 to date.

The COURT: Well, that's all. I will tell you what you would better do, gentlemen. Have you got any propositions of law?

Mr. HALL: Yes, sir.

The COURT: Well, let me have them. Where are those sections of the bankrupt act; let me have them also. Now, if you want to give me any authoritives as to whether this discharge operates as a bar to this claim, let me have them; let me have those authorities and I will look them over, and I will fix on a time when you may come in and I will give you a hearing. I think we better put it down at nine o'clock. No; I will put it down on my call as a case, and will, when reached, dispose of it. I will put it on this call, gentlemen, anywhere where you say.

Mr. HALL: We can be ready by Monday.

143 The COURT: I will put it right on after the Jansen case, this case that is on trial.

Mr. FRAKE: I meant 1891 instead of 1893.

The COURT: And then at 5 %?

Mr. FRAKE: Yes; from 1891.

The COURT: From July, 1891, at 5 %?

Mr. FRAKE: Yes, sir.

By leave and direction of the court evidence was allowed and directed to be offered upon the question of payment or satisfaction of the judgment sued on in this action; and thereupon M. W. ROBINSON was duly sworn and offered as a witness upon the part of the plaintiff and testified as follows:

My name is M. W. Robinson. I am now and was in 1871 an attorney-at-law, and have been practicing at this bar for the past 32 years. I assisted Mr. James Frake in the trial of the original suit of Vehmeyer *vs.* Forsythe, in which the judgment in question, rendered in 1871 and sued on in this case, was obtained, and have been familiar with the history of the case ever since.

No part of the said judgment sued on in this had ever been paid or in any way satisfied.

Which was all the evidence given, received, or offered in the before-entitled cause.

And thereupon the defendant, by his counsel, submitted to the

court the following propositions to be held in the decision of this case:

The defendant submits to the court the following propositions to be held by the court as the law of the case, to wit:

144 First. The court finds as a matter of law that the judgment sued on was neither founded upon fraud or embezzlement, within the meaning of these word- in section 5117 of the Revised Statutes of the United States, but that the same was

Refused. provable in bankruptcy against the defendant and was wholly released and discharged by the discharge in bankruptcy evidenced by the certificate introduced in evidence by the defendant.

Second. The court finds as a matter of law that even if the judgment sued on was found- upon a tort, such tort was merged in the judgment, and such judgment was therefore provable

Refused. under the bankruptcy act of the United States and was wholly discharged by the discharge in bankruptcy of defendant, the certificate of which has been introduced in evidence by the defendant.

Third. The court finds as a matter of law that the evidence introduced by the plaintiff of the declaration in the suit

Refused. in which the judgment sued on was rendered shows the declaration to have been substantially in assumpsit and not a case in tort.

Fourth. The court further finds that "fraud," in the act of Congress defining the debts from which a bankrupt is not relieved, means positive fraud or fraud in fact, involving moral

Held. turpitude or intentional wrong, as does embezzlement, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality.

Fifth. The court finds that if there were any fraud at all in the transaction on which the judgment sued on was

Refused. founded, it was implied fraud or fraud in law, and not fraud in fact, involving moral turpitude or intentional wrong.

Sixth. The court further finds as a matter of law that parol

145 evidence is not admissible to prove the record of the judgment sued on, inasmuch as the same was destroyed by

Refused. fire and has not been restored, as it might have been under the statutes of this State.

Seventh. The court further finds that the evidence of the plaintiff as to what the record of the judgment really was

Refused. is too indefinite and uncertain to establish the same, and the finding should therefore be for the defendant.

Eighth. The court further finds that the evidence as to what the declaration contained in the original action in which

Refused. this judgment was rendered does not show a cause of action for deceit or fraud in fact, but merely a cause of action in assumpsit.

Ninth. The burden of showing that the alleged judgment sued

on was found- upon a positive act of fraud, partaking
Held. of moral turpitude and intentional wrong, lies upon the plaintiff.

Tenth. The burden of showing that the alleged
Held. judgment sued on was never paid or satisfied is upon the plaintiff.

Eleventh. The court further finds as a matter of law
Refused. that under all of the evidence in this case the plaintiff cannot recover.

Twelfth. The court finds as a matter of law, from all of the evi-
dence in this case, that the judgment here sued on was
Refused. not founded upon any fraud practiced by the defendant upon the plaintiff.

Thirteenth. The court finds as a matter of law that the decree of
the county court allowing Forsyth to schedule is con-
Refused. clusive between the parties to this suit, as far as the question of fraud as an element in said judgment is concerned.

146 Fourteenth. The court finds that the certified copy of the
discharge in bankruptcy offered by the defendant is
Refused. an absolute defense to this suit, and that therefore the plaintiff cannot recover.

Fifteenth. The court finds that no parole evidence tending to
prove the record of the judgment sued on is admissi-
Refused. ble in this suit, and that the record should first have been restored, as directed by section 2 of chapter 116 of the statutes.

And thereupon the court marked "held" and held as law in the decision of said case the following of said propositions, to wit:

Propositions numbered fourth, ninth, and tenth.

And thereupon the court marked "refused" and refused to hold as law in the case the following of said propositions of law, to wit:

Propositions numbered first, second, third, fifth, sixth, seventh, eight-, eleventh, twelfth, thirteenth, fourteenth, and fifteenth.

To which ruling and decision of the court in refusing to hold said last-mentioned propositions as law in the decision of said case the defendant, by his counsel, then and there duly excepted.

And thereupon the court found the issues for the plaintiff, and entered a finding in favor of said plaintiff for the sum of $833.35, debt, and $2,076.90 damages entire.

To which rulings and findings of the court in finding the issues for the plaintiff and also in assessing the plaintiff's damages, as aforesaid, and to each of said rulings and findings the defendant, by his counsel, then and there duly excepted.

And thereupon the defendant, by his counsel, then and there moved the court to set aside the finding so rendered and to grant a new trial of said case, and filed the following motion for a new trial, in writing, to wit:

147 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

VEHMEYER *vs.* FORSYTH. } Gen. No., 131,807.

And now comes the said defendant, Jacob Forsyth, by Thomas J. Merrifield and Robert G. Hall, his attorneys, and moves the court to set aside the finding made herein against the said defendant, and demands a new trial in this cause for the following reasons:

1st. There is no evidence that the alleged judgment on which this suit was brought was ever recorded in the record prescribed by the statutes for the recording of judgments.

2nd. There is no evidence showing that the verdict of the jury in which the judgment sued on is alleged to have been recovered was ever returned into court.

3rd. The evidence of the plaintiff is too uncertain, vague, and indefinite to establish the existence of the alleged judgment sued on.

4th. The evidence of the plaintiff, being all by parol, is not sufficient to establish the existence of a destroyed record.

5th. It was incumbent upon the plaintiff to restore the record of the alleged judgment under and pursuant to the provisions of section 2 of chapter 116 of the statutes of this State before proceeding to a trial upon the alleged judgment.

6th. The court erred in admitting parol evidence on the part of the plaintiff tending to prove the record of the judgment.

148 7th. The court erred in refusing to admit proper evidence offered by the defendant tending to prove the nature and character of the cause of action sued on in the original suit in 1871.

8th. The court erred in finding for the plaintiff and in entering judgment against the defendant.

9th. The finding is against the law and evidence.

10th. The court should have held the propositions of law numbers 1, 2, 3, 5, 6, 7, 8, 11, and 12, 13, 14, and 15 to be the law of the case.

11th. There is no proof that the judgment sued on was founded upon fraud within the meaning of this word in section 5117 of the Revised Statutes of the U. S.

12th. The court erred in refusing to permit Jacob Forsyth to testify to the facts involved in and upon which the original suit was founded.

13th. The court erred in rejecting the statement of account signed by Vehmeyer and the letter of Vehmeyer offered by the defendant.

14th. The court erred in refusing to permit Marshall and Jacob Forsyth to swear to the effect that *that* there were 200 cords of wood ready for delivery to Vehmeyer at the time the declaration alleges that Forsyth refused to deliver said wood.

T. J. MERRIFIELD AND
ROBERT G. HALL.

149 But the court denied the motion for a new trial and gave judgment on the finding against the defendant; to which rulings and decisions of the court in denying said motion for a new trial and in giving judgment against the defendant the defendant, by his counsel, then and there duly excepted.

And thereupon the defendant, by his counsel, on June 24th, A. D. 1897, prayed an appeal to the appellate court in and for the first district of Illinois; which prayer was granted by the court upon the defendant filing his appeal in the penal sum of twenty-five hundred dollars in twenty days and his bill of exceptions in thirty days from said 24th day of June, A. D. 1897.

And on July 23rd, A. D. 1897, this cause came on for hearing on the motion of defendant to have his bill of exceptions settled, signed, and sealed by the judge who tried said cause, and thereupon the court entered an order herein extending the time to present and file said bill of exceptions five days from July 23rd, A. D. 1897.

And forasmuch as the matters above set forth do not fully appear of record in this case, the defendant tenders this his bill of exceptions and prays that the same may be signed and sealed by the judge of this court, pursuant to the statutes in such case made, which is done accordingly this 27th day of July, A. D. 1897.

JONAS HUTCHINSON, [SEAL.]
Judge Superior Court, Cook Co., Ill.

150 Superior Court.

VEHMEYER *vs.* FORSYTH. } 131,807.

Bill of Exceptions of Defendant.

Filed July 27, 1897.
JOHN A. LINN, *Clerk.*

ROBERT G. HALL AND
T. J. MERRIFIELD.
Att'ys for Def't.

And heretofore, to wit, on July 9th, A. D. 1897, there was filed in the office of the clerk of said court a certain appeal bond, which is on the words as follows, to wit:

151 *Appeal Bond, Appellate Court.*

Know all men by these presents that we, Jacob Forsyth, as principal, and American Surety Company of New York, as surety, of the county of Cook and the State of Illinois, are held and firmly bound unto Henry F. T. Vehmeyer, also of the same county and State, in the penal sum of twenty-five hundred dollars, lawful money of the United States; for the payment of which, well and truly to be

made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly, by these presents.

Witness our hands and seals this first day of July, A. D. 1897.

The condition of the above obligation is such that whereas the said Henry F. T. Vehmeyer did, on the 24th day of June, A. D. 1897, in the superior court of Cook county, in the State aforesaid, and of the June term thereof, A. D. 1897, recover a judgment against the above-bounden Jacob Forsyth for the sum of two thousand and seventy-six dollars and ninety cents, besides costs of suit, from which said judgment of the said superior court of Cook county the said Jacob Forsyth has prayed for and obtained an appeal to the appellate court within and for the first district in said State:

Now, therefore, if the said Jacob Forsyth shall duly prosecute his said appeal with effect and, moreover, pay the amount of the judgment, costs, interests, and damages rendered and to be rendered against him in case the said judgment shall be affirmed in said appellate court, then the above obligation to be void; otherwise to remain in full force and virtue.

JACOB FORSYTH. [SEAL.]
AMERICAN SURETY COMPANY
OF NEW YORK, [SEAL.]
By JOSEPH T. BOWER. [SEAL.]
Attest: DANIEL T. HUNT. [SEAL.]

O K.
M. W. ROBINSON,
Att'y for Pl'ff.

Approved:
JOHN A. LINN,
Judge Superior Court of Cook County.

152 STATE OF ILLINOIS, } ss:
County of Cook, }

I, John A. Linn, clerk of the superior court of Cook county, in and for the State of Illinois, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record, except the bill of exceptions, the original of which is, by stipulation of the parties, incorporated herein and made a part thereof, in a certain cause lately pending in said court, on the law side thereof, wherein Henry F. Vehmeyer was plaintiff and Jacob Forsyth defendant.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, this 11th day of September, A. D. 1897.

JOHN A. LINN, *Clerk.*

Paid $10.00.

153 In the Appellate Court of Illinois, First District, October Term, A. D. 1897.

JACOB FORSYTH, Appellant,
vs.
HENRY F. T. VEHMEYER, Appellee. } Appeal from Superior Court, Cook County.

Assignment of Errors.

Appellant assigns the following grounds of error:
The superior court erred—
1st. In assessing damages not claimed by appellee.
2nd. In assessing damages in excess of the amount of damages proven.
3rd. In overruling appellant's motion for new trial.
4th. In rendering judgment against appellant for $20.76 damages in addition to $833.35, debt.
5th. In admitting improper evidence on behalf of the appellees.
6th. In rejecting proper evidence offered on behalf of the appellant.
7th. In refusing to hold propositions of *how* numbered first, second, third, sixth, seventh, eight-, eleventh, twelfth, thirteenth, fourteenth, and fifteenth, submitted by the appellant.
8th. In finding for the appellee instead of for the appallant.
9th. In sustaining plaintiff's demurrer to defendant's additional pleas, filed January 28th, 1896.
10th. In excluding the evidence of Samuel J. Harmon, offered by defendant.

THOMAS J. MERRIFIELD AND
ROBERT G. HALL,
Attorneys for Appellant.

154 In the Appellate Court, First District, Illinois.

JACOB FORSYTH, Appellant,
vs.
HENRY F. T. VEHMEYER, Appellee. } No. 7368. Appeal — Cook Superior. Error — Cook.

I, Thomas N. Jamieson, clerk of the appellate court within and for the first district of Illinois, hereby certify that the transcript of record hereto attached and marked A is the original transcript of record filed in said appellate court on the 5 day of October, A. D. 1897, by said appellant.
In testimony whereof I have hereunto set my hand and seal of said court, at Chicago, this 18 day of May, A. D. 1898.

THOMAS N. JAMIESON,
[SEAL.] *Clerk of the Appellate Court,*
First District, Illinois.

155 At a term of the appellate court begun and held at Chicago, on Tuesday, the first day of March, in the year of our Lord one thousand eight hundred and ninety-eight, within and for the first district of the State of Illinois.

Present: Hon. Francis Adams, presiding justice; Thomas G. Windes, justice; Nathaniel C. Sears, justice; Thomas N. Jamieson, clerk; James Pease, sheriff.

Be it remembered that on the 1 day of November, A. D. 1897, it being one of the days of the November term, A. D. 1897, certain proceedings were had in said court and entered of record in words and figures following, to wit:

JACOB FORSYTH
vs.
HENRY F. T. VEHMEYER. } 7368. Appeal, Superior.

This day came the appellee, by his counsel, and moved the court to extend the time to November 20th, A. D. 1897, in which to file his briefs in said cause, and that the appellant may have to November 30th, A. D. 1897, in which to file his reply briefs in said cause, as per stipulation filed herein; and the court, being fully advised in the premises, doth order that said time be, and the same is hereby, extended.

And afterwards, on the 29th day of November, A. D. 1897, the following proceedings were had and entered of record in said cause, to wit:

JACOB FORSYTH
vs.
HENRY F. T. VEHMEYER. } 7368. Appeal, Superior.

This day came appellant, by his counsel, and moved the court to extend the time until December 10th, A. D. 1897, in which to file his reply briefs in said cause, as per stipulation filed herein; and the court, being fully advised in the premises, doth order that said time be, and the same is hereby, extended.

156 And afterwards, on the 14th day of March, A. D. 1898, the following proceedings were had and entered of record in said cause, to wit:

JACOB FORSYTH
vs.
HENRY F. T. VEHMEYER. } 7368. Appeal, Superior.

This cause, having this day been reached in the call of the docket, was argued by counsel for appellees, and the court, not being fully advised in the premises, doth order that said cause be taken under advisement.

And afterwards, on the 18th day of April, A. D. 1898, the following proceedings were had and entered of record in said cause, to wit:

JACOB FORSYTH, Appellant,
vs.
HENRY F. T. VEHMEYER, Appellee. } No. 7368. Appeal, Superior.

On this day came again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that in that record there is no error, therefore it is considered by the court that the judgment aforesaid be affirmed, with directions to the trial court to enter a like remittitur in that court; and it is further considered by the court that the said appellee recover of and from the said appellant his costs by him in this behalf expended, to be taxed, and that he have execution therefor.

And afterwards, on the 5th day of May, A. D. 1898, the following proceedings were had and entered of record in said cause, to wit:

JACOB FORSYTH
vs.
HENRY F. T. VEHMEYER. } 7368. Appeal, Superior.

157 This day came appellant, by his counsel, and moved the court for an appeal from the order and judgment of this court in said cause to the supreme court of Illinois; and the court, being fully advised in the premises, doth order that an appeal be allowed herein to the said supreme court, on condition that appellant doth within twenty days from this date execute and file in said cause a good and sufficient appeal bond, conditioned according to law, in the penal sum of twenty-five hundred dollars, with surety to be approved by the court.

And afterwards, on the 16th day of May, A. D. 1898, the following proceedings were had and entered of record in said cause, to wit:

JACOB FORSYTH
vs.
HENRY F. T. VEHMEYER. } No. 7368. Appeal from Cook Superior.

This day came appellant, by his counsel, and presented his certain appeal bond in said cause in the penal sum of twenty-five hundred dollars, with American Surety Company of New York as surety thereto; and the court, being fully satisfied as to the *the* qualifications of said surety, doth order that said appeal bond be, and the same is hereby, taken, approved, and filed herein.

And afterwards, on the same day, to wit, the 16 day of May, A. D. 1898, an appeal bond was filed in said cause; which said bond is in the words and figures following, to wit:

Know all men by these presents that we, Jacob Forsyth, as principal, and American Surety Company of New York, as surety, of the county of Cook and State of Illinois, are held and firmly bound unto Henry F. T. Vehmeyer, also of the same county and State, in the penal sum of twenty-five hundred dollars, lawful mo-ey of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly, severally, and firmly, by these presents.

Witness our hands and seals this 14th day of May, A. D. 1898.

The condition of the above obligation is such that whereas the said Henry F. T. Vehmeyer did, on the 24th day of June, A. D. 1897, in the superior court of Cook county, in the State aforesaid, and of the June term thereof, A. D. 1897, recover a judgment against Jacob
158 Forsyth for the sum of two thousand and seventy-six dollars and ninety cents, besides costs of suit, from which said judgment of the superior court of Cook county the said Jacob Forsyth prayed for and obtained an appeal to the appellate court within and for the first district of said State; and whereas the said appellate court did, on the 18th day of April, A. D. 1898, and at the March term thereof, A. D. 1898, affirm the judgment of the superior court aforesaid, and did render judgment against the above-bounden Jacob Forsyth for costs of suit, from which order of affirmance and judgment of the said appellate court the said Jacob Forsyth has prayed for and obtained an appeal to the supreme court of the State of Illinois:

Now, therefore, if the said Jacob Forsyth shall duly prosecute his said appeal with effect, and, moreover, pay the amount of the judgment, costs, interests, and damages rendered and to be rendered against him, said Jacob Forsyth, in case the said judgment shall be affirmed in said supreme court, then the above obligation to be void; otherwise to remain in full force and virtue.

JACOB FORSYTH. [SEAL.]
AMERICAN SURETY COMPANY [SEAL.]
[SEAL.] OF NEW YORK.
By JESSE SPALDING, *Res. Vice-Pres't.* [SEAL.]

Attest: FREDERICK F. NORCROSS, *Res. Ass't Sec'y.*

Approved May 16, 1898.
F. ADAMS, *Judge, etc.*

O K.
M. W. ROBINSON,
Att'y for Appellee.

I, Thomas N. Jamieson, clerk of the appellate court in and for the first district of the State of Illinois, do hereby certify that the foregoing is a true copy of the final order and judgment and all

other proceedings and appeal bond of the said appellate court in the above-entitled cause of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the said appellate court, at Chicago, this 16 day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

[COURT SEAL.] THOMAS N. JAMIESON,
Clerk of the Appellate Court of the First District.

159 In the Supreme Court of Illinois.

JACOB FORSYTH, Appellant,
vs.
HENRY F. T. VEHMEYER, Appellee. } Appeal from Appellate Court, First District.

The appellant says there is manifest error in the within record, in this:

1st. In holding that the judgment in question was recovered for fraud of appellant, and that his discharge in bankruptcy did not discharge him therefrom.

2nd. That the declaration given in evidence is in tort for false and fraudulent representations of appellant.

3rd. In holding the allegation that the representations were false and fraudulent implies that appellant knew of their falsity.

4th. In finding that the evidence was sufficient to prove the former existence of the record of the judgment sued on, and that it was destroyed by fire in October, 1871.

5th. In holding that the amended declaration might be regarded as an additional count, and the *ad damnum* in the original as applying to the latter declaration.

6th. In holding that as there was no specific objection made to the amended declaration for want of an *ad damnum* in the trial court, nor any motion made in arrest of judgment, that the objection therefor was unavailing in the appellate court.

7th. In ignoring the objection made by appellant that there was a variance between the amount of the debt as alleged in the declaration and the amount as shown by the evidence.

8th. In affirming the judgment of the superior court instead of reversing it.

9th. In rendering judgment in favor of appellee and against appellant.

10th. In confirming the ruling of the trial court in excluding the evidence offered to be proved by Jacob Forsyth, S. J. Harmon, and John Marshall and by the documents set forth as Defendant's Exhibits No. 1 and 2.

THOMAS J. MERRIFIELD AND
ROBERT G. HALL,
Att'ys for Appellant, Jacob Forsyth.

160 And afterwards, to wit, on the 18th day of June, A. D. 1898, certain proceedings were had and orders made and entered by said court, among which is the following, viz:

JACOB FORSYTH *vs.* HENRY F. T. VEHMEYER. } Appeal from Appellate Court of Illinois, First District.

Now, on this day, come the parties hereto; and this being one of the days set apart for the call of the docket under the rules of this court and it appearing to the court that appellant hath filed herein a duly certified transcript of the record and proceedings of the court below, together with printed abstracts thereof and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and *procedendo*, and said motions being taken under advisement for final hearing, and the clerk of this court reporting that said cause is now ready to be taken, *and* said cause is here submitted for the consideration and judgment of the court:

Therefore it is ordered by the court that this cause be, and the same is hereby, taken under advisement.

161 At a supreme court begun and held at Springfield, on Tuesday, the fourth day of October, in the year of our Lord one thousand eight hundred and ninety-eight, within and for the State of Illinois.

Present: Joseph N. Carter, chief justice; Alfred M. Craig, justice; Jacob W. Wilkin, justice; James H. Cartwright, justice; Benjamin D. Magruder, justice; Jesse J. Phillips, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Edward A. Baxter, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered, to wit, on the twenty-fourth day of October, A. D. 1898, the same being in vacation after the term of court aforesaid, the following proceedings were by said court had and entered of record, to wit:

JACOB FORSYTH *v.* HENRY F. T. VEHMEYER. } No. 321. Appeal from Appellate Court of Illinois, First District.

And now, on this day, this cause having been argued by counsel and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court, now here, that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that in that record there is no error; therefore it is considered by the court that the judgment aforesaid be affirmed in

all things and stand in full force and effect notwithstanding the said matters and things therein assigned for error; and it is further considered by the court that the said appellee recover of and from the said appellant his costs by him in this behalf expended, and that he have execution therefor.

162 At a supreme court begun and held at Springfield, on Tuesday, the 4th day of October, in the year of our Lord one thousand eight hundred and ninety-eight, within and for the State of Illinois.

Present: Joseph N. Carter, chief justice; Alfred M. Craig, justice: Jacob W. Wilkin, justice; James H. Cartwright, justice; Benjamin D. Magruder, justice; Jesse J. Phillips, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Edward A. Baxter, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered that afterwards, to wit, on the 24th day of October, 1898, the opinion of the court was filed in the words and figures following, to wit:

JACOB FORSYTH *vs.* HENRY F. T. VEHMEYER. } No. 195. Error to —. Appeal from First District.

163 Docket No. 321. Agenda 40. Northern Div. June, '98.

JACOB FORSYTH *v.* HENRY F. VEHYMEYER.

Per Curiam:

This case is brought by appeal from the appellate court for the first district. The opinion of that court, by Adams, P. J., is as follows:

"This is an appeal from the judgment rendered in an action of debt on a judgment. The declaration is in the usual form in such cases, and alleges that at the July term, 1871, of the superior court of Cook county the plaintiff (appellee) recovered a judgment against the defendant (appellant) for the sum of $833.35 damages and costs, the costs amounting to $6.75; that the record of the said judgment was destroyed by fire in October, 1871, and was not in existence at the time of the commencement of this suit. The appellant pleaded a discharge in bankruptcy in December, 1890, to which plea the plaintiff replied, in substance, as follows: That the action in which the judgment sued on was rendered was brought to recover damages sustained by the plaintiff by fraud of defendant, by which plaintiff was induced to pay to defendant about $1,200 by false and fraudulent representations of defendant that he owned and had in his possession, ready for delivery, about six hundred cords of wood in Lake county, Indiana; that said action was founded solely upon

fraud of defendant; that issue was joined in said action upon allegations made by the plaintiff in this declaration, and there being a jury trial, a verdict was returned in favor of the plaintiff, and against the defendant, for $833.35, as plaintiff's damages by reason of said fraud of defendant; that the judgment sued on was rendered upon said verdict and was founded solely upon fraud. To this replication defendant filed a rejoinder substantially traversing all of its material allegations. The case was tried by the court, by agreement of the parties, without a jury.

"The appellee called as a witness James Frake, an attorney, who testified that he brought the suit in which the judgment sued on was rendered, and drew the declaration to which the defendant pleaded not guilty; that he kept a docket, which he still had, in which he made entries of all steps taken in the case; that the suit was brought July 16, and the declaration, of which he had
164 not preserved a copy, was filed July 21, 1870; that the verdict was rendered May 9, 1871, and that the judgment was rendered July 29, 1871. The witness further testified that there was a formal verdict of guilty, assessing the plaintiff's damages at the sum of $833.35, signed by the foreman, and also that there was the usual judgment on such verdict, giving the form, and that about a month after the verdict was rendered he examined the records in the case, including the record of the judgment, and that the same were burned by the Chicago fire of October 8, 1871.

"Appellant's counsel contended, on the trial, that it was not competent to prove by parol the contents of the burned record; that it was incumbent on appellant to restore the record in the manner prescribed by the statute, and the admission of the oral testimony to prove the record is assigned as error, but as they have not urged this objection in argument we might consider it waived. On a former appeal in this case the court held against the contention that such proof is incompetent. *Forsyth v. Vehmeyer*, 55 Ill. App., 223. See, also, Black on Judgments, sec. 969, and cases cited; Freeman on Judgments, sec. 407; 1 Greenleaf on Evidence, sec. 509; *Mandville v. Reynolds*, 68 N. Y., 528; *Ashley v. Johnson*, 74 Ill., 392. Numerous other authorities might be cited to the same effect.

"The rule that the record, or an exemplified or sworn copy thereof, must be produced, is limited to cases in which it is within the power of the party relying on the record to produce such evidence. 1 Greenleaf on Evidence, sec. 86; 2 Jones on Law of Evidence, sec. 641.

"In *Church v. Hubbard*, 2 Cranch, 178, Marshall, C. J., delivering the opinion, says: 'The principle that the best testimony shall be required which the nature of the thing admits, or, in other words, that no testimony shall be received which presupposes better testimony attainable by the party who offers it, applies to foreign laws as it does to all other facts.'

"The statutory method of proving statutory records does not preclude proof by parol. *Mably v. Watts*, 98 N. C., 284; *Clifton v. Fort*, *id.*, 173.

"In *Weatherheads v. Baskerville*, 11 How., 329, the court said: 'A

rule in respect to judicial records is, that before inferior evidence can be received of their contents the loss of their existence must be clearly accounted for. It must be shown that there was such
165 a record; that it has been lost or destroyed, or is otherwise incapable of being produced, or that its mutilation from time or accident has made it illegible.'

"It is objected that even though the evidence was competent, it was insufficient to prove the record of the judgment. In addition to the testimony of the witness Frake that he saw and examined the record of the judgment, R. R. Stevens, formerly in the employ of Chase Bros. & Co., abstract-makers, being called as a witness, produced a book in which he had made entries of all proceedings in the suit in which the judgment sued on was rendered. He testified that the facts were taken from the original files and records, and were correct. These entries showed the title of the suit, the name of the action ('trespass on the case), when the suit was commenced, and the date and amount ($833.35) of the verdict, a motion for a new trial, the overruling of the motion July 29, 1871, and judgment on the verdict, etc. The witness further testified that he obtained the entry of the judgment in the first place from the clerk's minute book, and subsequently compared it with the record. He also testified that the originals from which the entries were made were destroyed by the great fire of October, 1871. A paper was admitted in evidence, by agreement of counsel, showing the entries made by the witness, which will be better understood by an examination of the record than as printed in the abstract. We think the evidence sufficient to prove the former existence of the record of the judgment, and that it was destroyed by fire in October, 1871.

"Appellant claims that by his discharge in bankruptcy, which was put in evidence, he was discharged from the judgment sued on. His contentions under this claim are: First, that the action in which judgment was rendered was assumpsit; secondly, if it was an action in tort for fraud, the declaration was defective in not alleging knowledge on his part of the falsity of the representations alleged to have been made by him; thirdly, that even though the gist of the action was fraud, the fraud was merged in the judgment, and his discharge in bankruptcy operated to discharge him from the judgment.

"The witness Frake testified, as before stated, that the original declaration was destroyed by the October fire of 1871; that he had no copy of it; that it contained only one copy; that he knew
166 the substance of it, and that before the former trial of this case, in the fall of 1893, he drafted what was a substantial copy of it, which he then had in court. The witness then testified that the declaration, in substance, was as follows:

"'Superior court of Cook county. To the July term, or of the August term, 1870. County of Cook and State of Illinois. Henry F. T. Vehmeyer (by Buschnell & Frake, his attorneys), complainant, complains of Jacob Forsyth, defendant, summoned, etc., in a trespass on the case. For that whereas, heretofore, to wit, on the 10th day of August, 1868, in order to induce plaintiff to advance him a

large amount of money, to wit, the sum of $1,500 (I think the declaration would say $1,200), falsely and fraudulently represented unto the plaintiff that he had a large amount of birch cord-wood, to wit, two hundred cords, cut and piled up near the Pittsburgh and Ft. Wayne, in the county of Lake and State of Indiana, ready to be shipped to Chicago; that said wood was contracted, or rather, perhaps, one Eldridge had contracted to purchase said wood at $6 per cord in the city of Chicago, when shipped, and that if Vehmeyer, the plaintiff, would advance to him at the rate of $5 per cord for the two hundred cords of wood, he, the defendant, would immediately—well, the defendant would immediately ship said cord-wood to the city of Chicago; that the plaintiff, Vehmeyer, relying upon the representation being true, advanced to the defendant the said sum of (I think the declaration said the sum of $1,200 or $1,000); that the defendant shipped only the sum of forty cords of wood to the said Eldridge, from which he, the said Vehmeyer, received the sum of $6 per cord (I don't know whether it is right or not); that the representations of the defendant, falsely, were false and fraudulent; that he did not have nor never did have in the county of Lake and State of Indiana two hundred cords of birch cord-wood piled up and ready for shipment to the city of Chicago to said Eldridge, but only had—neither in the county of Lake nor anywhere else—the sum of forty cords of birch cord-wood which was shipped by the said defendant to the said Eldridge. Wherefore the plaintiff asks damages to the extent of ($1,500 was the amount that was alleged in the declaration), and hence he brings this action of fraud and deceit against the defendant.'

"The witness was not allowed to read from the paper which
167 he had prepared before the former trial and which he said was a substantial copy of the written declaration, and was frequently interrupted in testifying as to the declaration. The declaration testified to is too plainly in tort for false and fraudulent representations to require argument. The allegation that the representations were false and fraudulent implies that appellant knew of their falsity. The same objection was made in *Merwin v. Arbuckle*, 81 Ill., 501, and *Nolte v. Reichelm*, 96 *id.*, 425, with reference to instructions, and the court in the latter case says: 'It is next contended that appellee's instructions 2 and 3 are erroneous, for the reason that they do not inform the jury that the false representation must have been knowingly made.' The instructions in express terms informed the jury that the representations, to be actionable, must have been fraudulently made. The same objection was urged to an instruction in *Merwin v. Arbuckle*, 81 Ill., 501, and it is there said: 'As the *scienter* enters into and is necessary to a fraudulent representation, the instruction virtually informed the jury that the representations must have been made knowing them to be false. Then, when they were informed that they must have been fraudulent, they were, in substance, told they must have been not only false, but plaintiff in error knew it.' But even though an express allegation of the *scienter* were necessary, its omission would be cured by the verdict. *Gerke v. Fancher*, 158 Ill., 375; *Dana v. Koltman*, de-

cided at the October term of this court, Gen. No. 6887; *Illinois Central Railroad Co. v. Simmons*, 38 Ill., 242, and other cases.

"The bankruptcy act, under which appellant's discharge was granted, provided: 'No debt created by fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary character, shall be discharged by proceedings in bankruptcy, but the debt may be proved and the dividend thereon shall be a payment on account of such debt.' (Bump on Bankruptcy, 741.) Whether the judgment sued on was for fraud is a question to be determined from the record. (*Flannagan v. Pearson*, 14 Nat. Bank. Reg., 37; 42 Tex., 1.) We think it clear that the judgment in question was recovered for fraud of appellee, and that his discharge in bankruptcy did not discharge him therefrom. Bump on Bankruptcy (10th ed.), pp. 741–743, and cases cited; Eden on Bankruptcy, 110; *Horner v. Spelman*, 78 Ill., 206; *Warner v.*
168 *Kronkite*, 6 Biss., 453; *In the matter of Devoe*, 2 Nat. Bank. Reg., 27; *Hughes v. Oliver*, 8 Pa. St., 426.

"Appellant urges that the judgment being provable, it is discharged. This contention is untenable, because the same section of the statute which accepts a debt created by fraud from the discharge, provides that it may be proved even though appellee had proved his judgment in bankruptcy and obtained a dividend less than the amount thereof. This would not operate to discharge appellant from the unpaid balance. (*Stokes v. Mason*, 12 Nat. Bank. Reg., 498; 10 R. I., 8.) The evidence is that no part of the judgment has been paid.

"Appellant's counsel objects to the exclusion of evidence tending to prove that there was no fraud in the transaction in respect of which the judgment was recovered. Such evidence is incompetent and it is properly excluded. (*Forsyth v. Vehmeyer*, and *Flannagan v. Pearson, supra.*) There was only one count in the declaration, and it was held in the last case that whether the judgment was rendered for fraud is not a question for the jury, but must be determined from the record. The suit having been a case of fraud, and the declaration having been framed accordingly, the judgment is conclusive as to the fraud, and the fraud is not, as contended by appellant's counsel, merged in the judgment. *Schuman v. Strauss*, 52 N. Y., 404, 408.

"Appellant assigns as error the sustaining a demurrer to his additional plea and demurrer, assigning especially that the plea is double, which it is, and is otherwise defective. The demurrer was properly sustained.

"It is objected that the amended declaration contains no *ad damnum*. The original declaration concludes with an *ad damnum*, and we are inclined to the opinion that the amended declaration may be regarded as an additional count, and the *ad damnum* in the original as applying to the latter declaration. No specific objection is made to the amended declaration for want of *ad damnum* in the trial court, nor was any motion made in arrest of judgment, and the objection therefore cannot be availed of here. *Barnes v. Brookman*, 107 Ill., 317; *Utter v. Jaffray*, 15 Ill. App., 236.

Lastly, it is objected that the damages are excessive. The court found the issues for the plaintiff, and found the debt to be
169 $833.35, and assessed the plaintiff's damages in the sum of $2,076.90. The evidence was that the interest due at the date of the judgment was $1,242.74, and the damages should have been assessed at the latter amount only. The court, in assessing the damages, evidently included the amount of the debt, $833.35, in the damages, and judgment was entered accordingly. Deducting from $2,076.90, the amount assessed as damages, $833.35, the remainder is $1,243.55. Appellee has filed a *remittitur* of all damages in excess of $1,242.74, the amount of the interest. A *remittitur* of $834.16 from the amount of damages, $2,076.90, will be entered here, so from that the judgment will be for $833.35 debt and $1,242.74 damages, and the judgment will be affirmed with directions to the trial court to enter a like *remittitur* in that court. Appellant not having specifically called the attention of the trial court to the excess of damages, he will not recover the costs of this court."

From a careful examination of the facts presented by the abstract in this case, and of the briefs herein, we have reached the same conclusion as was reached by the appellate court in its judgment, and we concur with the appellate court in its opinion and adopt the same as the opinion of this court.

The judgment of the appellate court for the first district is affirmed.

Judgment affirmed.

170 STATE OF ILLINOIS, } ss.:
Supreme Court, }

I, Christopher Mamer, elected clerk of the supreme court in and for the northern grand division of the State of Illinois and keeper of the records and seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said supreme court in the above-entitled cause of record in my office.

This copy is not to operate as a mandate in any event. Mandate will be issued only on request and payment of costs.

In testimony whereof I have set my hand and affixed the seal of the said supreme court, at Springfield, Nov. 2, 1898.

[Seal Supreme Court of Illinois.]

C. MAMER,
Clerk of the Supreme Court.

[Endorsed:] Illinois supreme court. Jacob Forsyth *v.* Henry F. T. Vehmeyer. Opinion. Filed Oct. 24, 1898. Mr. Edward Rohy.

171 At a supreme court begun and held at Springfield, on Tuesday, the sixth day of December, in the year of our Lord one thousand eight hundred and ninety eight, within and for the State of Illinois.

Present: Joseph N. Carter, chief justice; Alfred M. Craig, justice; Jacob W. Wilkin, justice; James H. Cartwright, justice; Benjamin

D. Magruder, justice; Jesse J. Phillips, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Edward A. Baxter, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered that afterwards, to wit, on the eighth day of December, A. D. 1898, certain proceedings were had and orders made by said court, among which is the following, viz:

JACOB FORSYTH *vs.* HENRY F. T. VEHMEYER. } 321. Appeal from Appellate Court of Illinois, First District.

Now, on this day, this cause coming on to be heard upon the petition of the appellant for a rehearing herein, and the court being now duly advised in the premises, it is considered and ordered by the court that said petition for a rehearing be overruled and denied.

And it is further considered by the court that said petitioner pay the costs and charges herein taxed.

172 And afterwards, to wit, on the 10th day of December, A. D. 1898, there was filed in said cause a certain petition and bond; which said petition and bond, with the endorsements thereon, are in the words and figures following, viz:

ILLINOIS, *ss:*

In the Supreme Court.

JACOB FORSYTH, Appellant, *vs.* HENRY F. T. VEHMEYER, Appellee. } Appeal from First District.

To the Honorable Joseph N. Carter, chief justice of the supreme court of Illinois:

The above-named appellant, Jacob Forsyth, respectfully petitions your honor to allow a writ of error for the removal of this cause to the Supreme Court of the United States, and to sign the citation, etc.

The decision of the cause is that the discharge in bankruptcy of Jacob Forsyth, duly granted by the district court of the United States in and for the district of Indiana, which was duly pleaded to the action and proved, is not sufficient to bar the action, and the case is within the jurisdiction of the Supreme Court of the United States for review thereof by writ of error.

EDWARD ROBY,
Counsel for said Jacob Forsyth.

Let a writ of error issue in pursuance of the within petition.

JOSEPH N. CARTER,
Chief Justice Supreme Court, State of Illinois.

173 Know all men by these presents that we, Jacob Forsyth, as principal, and American Surety Company of New York, as sureties, are held and firmly bound unto Henry F. T. Vehmeyer in the full and just sum of twenty-five hundred dollars, to be paid to the said Henry F. T. Vehmeyer, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this ninth day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a term of the supreme court of Illinois, in a suit depending in said court between said Jacob Forsyth, as appellant, and said Henry F. T. Vehmeyer, appellee, a judgment was rendered against the said Jacob Forsyth, appellant, affirming the judgment of the superior court of Cook county, in said State of Illinois, from which judgment the said Jacob Forsyth has sued out a writ of error from the Supreme Court of the United States to remove the said judgment if the supreme court of Illinois into said Supreme Court of the United States, and having obtained such writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Henry F. T. Vehmeyer, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

174 Now, the condition of the above obligation is such that if the said Jacob Forsyth shall prosecute said writ of error to effect and answer all damages and costs is he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

[12½ cents revenue stamps.]

JACOB FORSYTH. [SEAL.]
AMERICAN SURETY COMPANY
OF NEW YORK, [SEAL.]
By JESSE SPALDING, *Res. Vice-Pres.* [SEAL.]
Attest: FREDERICK F. NORCROSS, *Res. Ass't Sec.*

Sealed and delivered in presence of—

——, ——.

Approved by—
JOSEPH N. CARTER,
Chief Justice Supreme Court, State of Illinois.

STATE OF ILLINOIS, } ss:
County of Cook, }

On this 9th day of December, 1898, before me personally came Frederick F. Norcross, known to me to be the resident assistant secretary of the American Surety Company of New York, the corporation described in and which executed the annexed bond of

175 Jacob Forsyth as surety thereon, and who, being by me duly sworn, deposes and says that he resides in the city of Chicago,

State of Illinois; that he is the resident assistant secretary of said American Surety Company of New York and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of New York and is authorized to do business in the State of Illinois; that said company has complied with the provisions of the act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Jacob Forsyth is the corporate seal of said American Surety Company of New York and was thereto affixed by order and authority of the board of directors of said company, and that he signed his name thereto by like order and authority as resident assistant secretary, and that he is acquainted with Jesse Spalding and knows him to be the resident vice-president of the said company, and that the signature of the said Jesse Spalding subscribed to said bond is in the genuine handwriting of said Jesse Spalding and was thereto subscribed by order and authority of said board of directors, and that the assetts of said company, unincumbered and liable to execution, exceed its claims, debts, and liabil-ties of every nature whatsoever by more than the sum of five hundred thousand dollars.

FREDERICK F. NORCROSS.

Sworn to, acknowledged before me, and subscribed in my presence this 9th day of December, 1898.

R. R. GILNEY,
[SEAL.] *Notary Public.*

Endorsed on cover: Case No. 17,243. Illinois supreme court. Term No., 180. Oliver O. Forsyth, administrator of the estate of Jacob Forsyth, deceased, plaintiff in error, *vs.* Henry F. T. Vehmeyer. Filed January 3rd, 1899.

180

No. 1268.

Office Supreme Court U. S.
FILED
MAR 20 1899
JAMES H. McKENNEY
CLERK.

Brf. of Roby for P. in E. (mo.)

Filed Mar. 28, 1899.

October Term, A. D. 1898.

United States Supreme Court.

JACOB FORSYTH, Plaintiff in Error,

vs.

HENRY F. T. VEHMEYER, Defendant in Error.

Brief Against Motion to Dismiss Writ of Error.

EDWARD ROBY,
Counsel for Plaintiff in Error.

Term No. 658.

United States Supreme Court.

JACOB FORSYTH, PLAINTIFF IN ERROR,

vs.

HENRY F. T. VEHMEYER, DEFENDANT IN ERROR.

Brief Against Motion to Dismiss Writ of Error.

Said Jacob Forsyth having died January 29, 1899, this brief is put in by and on behalf of Oliver O. Forsyth, his administrator, who has suggested the death and prayed to be admitted as a party, etc.

Pleading in Illinois is according to the Common Law.

Review may be had, in the Appellate Courts, by writ of error, or by appeal in the nature of a writ of error (in actions like this), which courts have jurisdiction, not only of questions of law, but also of questions of fact, to some extent. From the Appellate Court the case may be removed into the Supreme Court of the State, by writ of error or like appeal; but the Supreme Court of the State has jurisdiction to review (in actions like this) on questions of law only. (*Gravett* v. *Davis*, 92 Ill., 190, pp. 191, 192; *Moore* v. *Tierney*,

100 Ill., 207; *Wabash Ry. Co.* v. *Henks*, 91 Ill., 406; *R. R. Co.* v. *McMath*, 91 Ill., 104.)

This is an action of *Debt*, brought by Vehmeyer, in January, 1891, in the Superior Court of Cook County, upon a judgment of the same court, entered July 29, 1871, in favor of Vehmeyer against Forsyth.

Forsyth *pleaded* (in due form) a discharge in bankruptcy, granted to him December 30, 1880, by the United States District Court for Indiana.

Vehmeyer *replied* that the debt was created by fraud, within the meaning of the bankrupt act of the United States.

A jury was waived and the cause was submitted to the court for trial.

Forsyth proved his discharge in bankruptcy, granted December 30, 1880, as pleaded.

Vehmeyer proved that the files and record of the Superior Court of Cook County were destroyed in the great fire of Chicago of October 8 and 9, 1871; and that no copy of any pleading, or of the judgment, existed.

He produced an abstract, or private docket, made in the course of their business at the time, by Chase Brothers & Company, persons engaged in making abstracts of title to real estate, which is ruled in columns: "Names of Parties;" "Action;" "When Commenced;" "Date of Judgment;" "Amount of Judgment," and so forth. The names of the parties, and date and amount of the judgment being given, the *Action* given is *Trespass on the case.*

He produced a witness, who (from his recollection only) testified to the contents of the destroyed declaration and record of judgment. The latter was in the simplest form of a judgment for money, and defendant in error does not claim that there is anything in it tending to show fraud, except as it adjudged damages against Forsyth upon the declaration.

The *opinions* of the Appellate and Supreme Courts *of Illinois* are no part of the record (*Moore* v. *Williams*, 132 Ill., 591, p. 593; *Coalfield Co.* v. *Peck*, 98 Ill., 139, pp. 144, 145); but, pursuant to the rule of this court, the opinion of the Supreme Court of Illinois has been certified up, and that purports to give a copy of the opinion of the Appellate Court; which, in turn, purports to give a copy of the destroyed declaration, deduced from the oral testimony of the witness.

The following is a copy of the declaration as the testimony of the witness gave it:

"Henry F. T. Vehmeyer, *complainant*, by Buschel & Frake, his attorneys, complains of Jacob Forsyth, defendant, summoned in a trespass on the case;

For that whereas, heretofore, to wit: on the 10th day of August, 1868, in order to induce plaintiff to advance him a large amount of money, (to wit: the sum of $1,200,) falsely and fraudulently represented unto the plaintiff that he had a large amount of birch cord wood, (to wit: 200 cords) cut and piled up near the Pittsburgh and Ft. Wayne, in the County of Lake and State of Indiana, ready to be shipped to Chicago, that one Eldredge had contracted to purchase said wood at $6 per cord in the city of Chicago, when shipped, and that if Vehmeyer, the plaintiff, would advance to him at the rate of $5 per cord for the 200 cords of wood, he the defendant, would immediately ship said cord wood to the city of Chicago; that the plaintiff, Vehmeyer, relying upon the representation being true, advanced to the defendant said sum of $1,000;

That the defendant shipped only the sum of 40 cords of wood to the said Eldredge, from which he, said Vehmeyer, received the sum of $6 per cord;

That the representations of the defendant falsely, were false and fraudulent; that he did not have, nor never did have, in the county of Lake, and State of Indiana, 200 cords of birch cord wood piled up and ready for shipment to the city of Chicago, to said Eldredge; but only had, neither in the county of Lake, nor anywhere else, the sum of 40 cords of birch cord wood which was shipped by the said defendant to the said Eldredge.

Wherefore the plaintiff asks damages to the extent of $1,500, and hence he brings this action of fraud and deceit against the defendant."

The foregoing is all the evidence given by Vehmeyer to support his replication, that the debt of Forsyth was created by fraud, within the meaning of the bankrupt act.

It is apparent that the legal effect of the written record is a question of law (*Flannagan* v. *Pierson*, 42 Tex., 1; 1 *Thompson on Trials*, §§ 1,065, 1,067, 1,071); and that this question of law is a federal question, when

it arises upon a *plea* and proof of a discharge in bankruptcy, *and replication*, that the debt was created by fraud within the meaning of the bankrupt act of the United States.

In rebuttal, Forsyth produced an abstract, or private docket made in the course of their business, at the time, by Shortall & Hoard, persons engaged in making abstracts of title to real estate, which is ruled in columns, with column heads like the other, and is substantially identical; except as it shows indications of a little more accuracy and precision; and the kind of action given in the column headed *Action* is *Assumpsit*.

Forsyth offered testimony tending to prove that the plaintiff (Vehmeyer) did not make any claim of fraud on the trial in 1871; that no evidence tending to prove fraud was given on that trial; and that such point or question was not adjudicated at that trial.

These offers of testimony presented the matter in a variety of forms, and appear at five several places in the record. Objection was made by Vehmeyer in each case; the objection was each time sustained; and exception was duly saved in each instance.

Forsyth also offered testimony that at that trial in 1871, the court instructed the jury that no fraud had been shown in the case, and that it was the duty of the jury simply to determine the amount, if any, which Forsyth owed to Vehmeyer. Vehmeyer objected, and the court excluded the evidence, and Forsyth saved his exception.

The exclusion of the evidence, on which these exceptions were saved, was duly assigned for error in the Appellate and Supreme Courts of Illinois, both of which have adjudged that the exclusion was no error.

This is clearly a question of law. And as it is a question of law on which the effect of the act of Congress, upon the debt shown by the declaration and judgment of 1871, must turn, it is a federal question. Otherwise a state court, by giving an arbitrary or erroneous construction or effect to any evidence of debt,

could exclude any person from the benefit of the act of Congress, though clearly and of right entitled to it.

In *Palmer* v. *Hussey*, 119 U. S., 96, at page 98, in deciding a motion to dismiss the writ of error for want of jurisdiction, this court said (Mr. Chief Justice WAITE, delivering the opinion of the court): "The motion to dismiss is denied. Palmer * * * specially set up and claimed an immunity, under section 5,117 of the revised statutes, from the operation of the discharge in bankruptcy, because of the fraudulent and fiduciary character of his debt, and the decision was against him. *This gives us jurisdiction*, since the exemption depends *on the construction and effect of section 5,117*, which provides that no debt created by the fraud of the bankrupt, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy."

Asserting and exercising jurisdiction, for the same cause, this court in *Neal* v. *Clark*, 95 U. S., 704, reversed a judgment of the Supreme Court of Appeals of Virginia; in *Noble* v. *Hammond*, 129 U. S., 65, it reversed a judgment of the Supreme Court of Vermont; in *Hennequin* v. *Clews*, 111 U. S., 676, it affirmed a judgment of the Court of Appeals of the State of New York (p. 684); and in *Upshur* v. *Briscoe*, 138 U. S., 365, it affirmed a judgment of the Supreme Court of Louisiana.

Counsel for Vehmeyer, in support of his motion to dismiss this writ of error, quotes from the opinion in the case, given by both the Appellate and Supreme Courts of Illinois (printed in 52 N. E. Reporter, 55, see p. 57, second column): "*Whether the judgment sued on was for fraud, is a question to be determined from the record. Flannagan v. Pearson, 42 Tex., 1.*"

In the case so cited, the record of a judgment, consisting of the pleadings and judgment entry against Flannagan, was given in evidence, and was by the trial court submitted to the jury for its decision, whether that record proved that the debt was created by fraud, and

the reviewing court held: "We think it was error to submit to the jury an issue as to whether the judgment was obtained for fraud or not. That question was to be determined *by the court* from an inspection of the record in the case including the pleadings." (*Flannagan* v. *Pearson*, 42 Texas, p. 2.)

This seems to demonstrate, that, from the view of the case taken by the counsel for Vehmeyer, in the trial court, as well as in the Appellate and Supreme Courts, and from the view taken by the trial, the Appellate and the Supreme Courts of Illinois there was no question of fact in the case, but only the question of law, whether the debt proved by and merged in the record of 1871, (proved by Vehmeyer) appeared by that record to be created by fraud, within the meaning of the bankrupt act, so as to except it from the effect of the discharge in bankruptcy, issued under and in pursuance of the bankrupt act.

The Chief Justice of the Supreme Court of Illinois, allowed the writ of error to remove the case to this court, and signed the citation attached to the record.

Doubtless he recognized that the question whether the discharge in bankruptcy released Forsyth from the debt proved by the judgment (whether that was in assumpsit or case) was the vital question in the action, and believed that that question was properly reviewed by the Supreme Court of Illinois; which had, in the case, jurisdiction of questions of law only; and that this court would have jurisdiction of the same vital question.

While the counsel for defendant in error has not included a formal motion to affirm in the draft of motion served on the undersigned, their brief closes with such a motion, and calls on plaintiff in error to state points on which the several courts of Illinois manifestly erred upon federal questions, and to cite authorities displaying such manifest error.

Two errors are manifest.

(1.) The courts of Illinois erred in holding that the declaration and judgment of 1871 as shown by Vehmeyer, proved that the debt, merged in the judgment, was created by fraud within the meaning of the bankrupt act, so that, as to that debt, Forsyth was excluded from the benefit of his discharge.

The courts of Illinois erred in holding that judgment to prove, as *res adjudicata*, or otherwise, that the debt was *created by fraud within the meaning and intent of the provisions of the bankrupt act of the United States.*

Neal v. Clark, 95 U. S., 704, pp. 708–9.
Wolf v. Stix, 99 U. S., 1, pp. 7–8.
Hennequin v. Clews, 111 U. S., 676, pp. 681–3.
Palmer v. Hussey, 119 U. S., 96, pp. 97–8.
Noble v. Hammond, 129 U. S., 65, pp. 68–70.
Upshur v. Briscoe, 138 U. S., 365, pp. 376–8.

(2.) The courts of Illinois erred in excluding the evidence offered by Forsyth tending to show that the judgment of 1871 was upon the debt only; and that it did not embrace any question whether that debt was *created by fraud within the meaning and intent of the provision of the bankrupt law of the United States.*

Russel v. Place, 94 U. S., 606, p. 608.
Packet Co. v. Sickles, 5 Wal., 580, p. 592.
Wells on Res Adjudicata; Secs. 200, 201, 215, 216, 297, 302.
Lawrence v. Hunt, 10 Wend., 80, p. 84.
Wood v. Jackson, 8 Wend, 9, p. 36.
2 Black on Judgments, Sec. 624.

"Whenever a judgment in a former action is relied upon as conclusive of a particular point or question, it may be shown by extrinsic evidence not inconsistent with the record, that such point or question was not adjudicated in that action, if in law the judgment could have been rendered on any other ground."

2 Black on Judgments, Sec. 628.
1 Greenleaf on Ev., Sec. 532.

"Though the declaration in the former suit may be broad enough to include the subject-matter of the second action, yet if, upon the whole record it remains doubtful whether *the same* subject-matter was actually passed upon, it seems that parol evidence may be received to show the truth. So, also, if the pleadings present several distinct propositions, and the evidence may be referred to either or to all with the same propriety, the judgment is not conclusive, but only prima facie, upon any one of the propositions, and evidence aliunde is admissible to rebut it." (1 Greenleaf on Ev., 532.)

FIRST.

The first point is, that, giving the evidence produced by Vehmeyer the utmost scope that it will bear, it did not amount to evidence that the debt of Forsyth was created by fraud, *according to the sense of that expression in the bankrupt act;* and the courts of Illinois erred in assuming that it did amount to such proof, either as res adjudicata or as presumptive evidence.

Evidence that the action was "*trespass on the case,*" does not tend to show that it was for a debt created by fraud.

The action of assumpsit is an action of trespass on the case upon promises. An action for malicious injury to ones clothing, or other property, or for personal injury, or for the burning of grass or crops, or fences or buildings, or stacks, by sparks from a locomotive may be an action of trespass on the case. Those words, *trespass on the case*, do not imply a debt created by fraud, any more than the words, *action at law* would imply that the action is for a debt created by fraud.

The evidence of the contents of the first declaration

was, by the testimony of the plaintiff's attorney, who begun the former action as well as this,—testimony given after a neglect *for twenty-six years* (by the party who called him) to restore the burned record under the common law or under Section 2 of Chapter 116 of the Revised Statutes of Illinois of 1874, when in the nature of things, no man could remember that any particular words were or were not in the lost paper. (*Nichol* v. *Miller*, 37 Ill., 387, p. 410; *Marshall* v. *Peck*, 91 Ill., 187, pp. 189, 190.)

Neither the prejudice of the witness in favor of his client, nor the infirmities of memory after so many years of neglect, nor the fact that the law would not allow the witness to study out what was material for him to swear to and write it out in his closet and read such paper as his testimony, or look at such paper while testifying, (*1 Greenleaf on Ev.*, Sec. 436, 438; *Thompson on Trials*, Sec. 400), could add words which the witness did not speak, nor facts to which he gave no testimony. They could not put words into his mouth which he did not utter, nor supply material testimony which he did not give.

Therefore we must consider the declaration in the words above printed; *in issue by the general issue;* the verdict in words to which he testified:

"We the jury find the defendant guilty and assess the plaintiff's damages at $833.35;"

and the judgment in the words to which he testified:

"Therefore it is considered by the court that the plaintiff have and recover from the said defendants his said damages $833.35, in form as assessed by the jury aforesaid, together with his costs in this behalf expended, and that he have execution therefor."

If that declaration, issue, verdict and judgment, in the words given, without the addition of a syllable, does not prove that the debt was created by fraud, it was not proved.

That it was created by fraud within the meaning of the bankrupt act was an affirmative averment of the replication; it must be *proved*, or the repliant must be held to have failed in his proof.

U. S. R. S., Sec. 5,117. *No debt created by the fraud or embezzlement of the bankrupt*, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy: but the debt may be proved, and the dividend thereon shall be a payment on account of such debt.

Sec. 5,118. No discharge shall release, discharge or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety or otherwise.

Sec. 5,119. A discharge in bankruptcy duly granted shall, subject to the limitations imposed by the two preceding sections, release the bankrupt from all debts, claims, liabilities and demands which were or might have been proved against his estate in bankruptcy. It may be pleaded by a simple averment that on the day of its date such discharge was granted to the bankrupt, setting a full copy of the same forth in its terms as a full and complete bar to all suits brought on any such debts, claims, liabilities or demands. The certificate shall be conclusive evidence in favor of such bankrupt of the fact and regularity of such discharge. (Statute of March 2, 1867, Ch. 176, Sec. 33, 34; 14 U. S. Statutes at large, 532, 533.)

This court has determined that certain principles govern the construction of these sections, and has established the most liberal construction in favor of discharge, and an extremely strict construction of the section of exceptions, and has applied these principles to the facts in a number of cases, often reversing the judgments of the highest state courts.

By application of the maxim *noscitur a sociis* and other rules of construction this court finds that the words "created by fraud" in the statute, are to be strictly construed, and allow no collateral latitude whatever; that they include only such frauds as are of the same grade of moral turpitude with embezzlement; and that frauds which involve less turpitude, or are incidental or collateral, so that the debt was not, in fact, created by the fraud itself, constitute no bar to the discharge; and that "such a construction of the statute is consonant with equity and consistent with the object and intention of the congress. * * * A different construction would be inconsistent with the liberal spirit which pervades the entire bankrupt system." (*Neal* v. *Clark*, 95 U. S., 704, pp. 708, 709.)

The judgment of the Supreme Court of Virginia was reversed by this decision.

In *Hennequin* v. *Clews*, 111 U. S., 676, this court reaffirms the above stated principles of Neal v. Clark (p. 681); and having mentioned the reasons leading to the first adoption of construction favorable to discharge (p. 679), and referred to decisions of state courts which were contrary to these principles (p. 680), and returned to the doctrine of Neal v. Clark, the court proceeds (p. 682): "The English authorities are more in accord with the decisions in this country which take a different view from our own on this question." The court then states cases where it would hold the debt discharged, of which the English case said: "no doubt this debt was incurred by fraud," (p. 683), and cites numerous English cases of like character. The court then says: "It is evident that the English courts regard many transactions as frauds or breaches of trust under their statutes, which we do not hold to be such under our bankrupt acts." The case then affirms "the liberal construction made in favor of the certificate of discharge in this country," and concludes: "We think that the previous decisions of this court, and of the state courts in the same direction, accord with the true spirit and meaning of the Act of Congress, and with the necessities of our business conditions." (pp. 683–4.)

In this case the judgment of the Court of Appeals of New York was affirmed.

Wolf v. *Stix*, 99 U. S., 1, at page 7, distinguishes that "to come within this exception of the bankrupt act, the debt must be *created* by fraud"; and inasmuch as the whole creation of debt was not by fraud, but the fraud was in an incident, or collateral part, it was held that the debt did not come within the exception. (The judgment of the U. S. Circuit Court was reversed.)

In *Palmer* v. *Hussey*, 119 U. S., 96, at page 98, this court held that "the fraud and trust established by the findings were not of a character to bar the effect of the discharge." * * * * *

"It is clear that, under the ruling of this court in *Hennequin* v. *Clews*, 111 U. S., 679, there was no such fraud in the creation of the debt, * * * as to bar the operation of the discharge."

In *Noble* v. *Hammond*, 129 U. S., 65, this court, at pages 68 and 69, considered the principles of decision so enunciated in *Neal* v. *Clark*, *Wolf* v. *Stix*, and *Hennequin* v. *Clews*, and concluded (p. 70): "The judgment of the Supreme Court of Vermont is in conflict with the *principles* laid down by the decisions of this court, as well as the general drift of those of the several state courts, and is, therefore, reversed."

In *Upshur* v. *Briscoe*, 138 U. S., 365, at pages 376–378, this court reviews the several cases above cited, beginning with the words (p. 376): "The construction "by this court of Section 33 of the bankruptcy Act of "1867 has been as follows" (then follow references to said cases): The court then cites a Massachusetts case (pp. 377–8), which distinguishes between the creation of the debt by fraud, and the effect of associated, collateral or incidental frauds, which did not create the debt.

The case then proceeds to apply the principle of extremely strict construction, to limit other associated words to the narrowest possible application.

If *trusts* within the meaning of the statute, were by construction limited to such as "implied a fiduciary relation existing previously to, or independently of the transaction from which the excepted debt arose," as strict a construction applies also to *the creation of the debt*, referred to in the statute.

In deciding that the words limiting discharge, are to be very strictly construed, and that they do not embrace debts arising from trusts of the character involved, this court, in *Neal* v. *Clark*, 95 U. S., at page 708, quotes from the opinion of the court delivered by Mr. Justice McLean in *Chapman* v. *Forsyth*, 2 How., 202: "If the act embrace such a debt, it will be difficult to limit its application. It must include all debts arising from agencies, and indeed all cases where the law implies an obligation from the trust reposed in the debtor. * * The cases enumerated—the defalcation of a public officer, executor, administrator, guardian or trustee, are not cases of implied but special trusts, and the other fiduciary capacity mentioned must mean the same class of

trusts. The act speaks of technical trusts, and not those implied from the contract. A factor is not therefore within the act." The same language was quoted as furnishing one reason for the decision of *Hennequin* v. *Clews*, 111 U. S., at page 679. Applying parallel reasoning to the matters alleged in the declaration of Vehmeyer v. Forsyth, on which the judgment was obtained in 1871, it appears that if Forsyth was not discharged from that debt, very few borrowers or purchasers on credit could have been discharged. Every lawyer who, about the time of borrowing, boasted a little too much of fees earned, every farmer who said he was about to haul his crop to town and that it was a large one, when he intended to haul only part, every merchant who boasted a little too enthusiastically of his sales, at the time of borrowing or receiving credit, would have created by fraud, the debt incurred.

These cases apply very closely to the case at bar. They hold that the line "no debt created by the fraud or embezzlement" of the bankrupt, by association of words, limits the meaning of the word fraud to such frauds as are of the character of or equal moral turpitude with embezzlement; and that this limitation of meaning by the association extends to bar breaches of all ordinary agencies and mercantile and special trusts, from the operation of the section. If culpability, or violation of strict integrity can be spelled out of said declaration, still there was no such creation of the debt by fraud, as these cases require, to annul the discharge in bankruptcy pleaded by Forsyth.

We will now examine more closely the evidence produced by Vehmeyer, held by the courts of Illinois to prove that the debt of Forsyth was created by fraud, within the intent and meaning of the act of congress.

The first abstract named the case "Assumpsit," the second named it "Trespass on the Case."

Actions are ordinarily begun by præcipe, in which the plaintiff's attorney directs the clerk to issue a summons commanding the defendant to answer unto the plaintiff

in a plea of " trespass on the case upon promises " (or any named action) to the damage of the plaintiff of (any sum named). (*Meservey* v. *Beckwith*, 41 Ill., 452, p. 453; *Durham* v. *Heaton*, 28 Ill., 264, p. 271; *Thompson* v. *Turner*, 22 Ill., 389, p. 390.)

All declarations begin with the statement that plaintiff complains of defendant, who has been summoned in a plea of—naming the action thus: trespass on the case —trespass on the case upon promises—assumpsit—or other name. The clerk, who is a ministerial officer, cannot judge from the averments, but takes the name of the action from this naming, or from the praecipe where no narr. is filed. So these abstract clerks take their note from the name given, and the note is not evidence what the declaration contains. If the declaration when filed is variant from the writ, the defendant may waive the variance and plead to the merits, or plead the variance. (*C. & T. C. & R. Co.* v. *Lickiss*, 72 Ill., 521, p. 522; *Messervey* v. *Beckwith*, 41 Ill., 452, p. 454; *1 Chitty Pl.*, 442, 254-5.)

In any event the fact that an action is " trespass on the case " does not tend to prove that fraud is averred in any form. (3 Bl. Com., 158, 159, 122; 2 Chitty's Pleadings, 1-2 " Beginnings and Conclusions of Declarations "; Puterbaugh Common Law Pl., 6th Ed., 882; Same title, 7th Edition, pp. 75-6.)

" Trespass on the case," is, " the form of action at common law, adapted to the recovery of damages for some injury resulting to a party from the wrongful act of another, unaccompanied by direct or immediate force; or which is the indirect or secondary consequence of such act." (*Black's Law Dic.*)

The verdict which is the response to the issue is, in nearly all cases, " guilty " or " not guilty;" and a verdict of guilty does not, in itself, carry any suggestion of fraud. (Puterbaugh Com. Law Pl., 7th Ed., 843.)

The only evidence supposed to show fraud, is the declaration testified to by the witness, and set out in the opinion of the Illinois courts. It reads:

"Henry F. T. Vehmeyer, *complainant*, by Buschel & Frake, his attorneys, complains of Jacob Forsyth, defendant, summoned in a trespass on the case;

"For that whereas, heretofore, to wit: on the 10th day of August, 1868, in order to induce plaintiff to advance him a large amount of money (to wit: the sum of $1,200), falsely and fraudulently represented unto the plaintiff that he had a large amount of birch cord wood (to wit: 200 cords), cut and piled up near the Pittsburgh and Ft. Wayne, in the County of Lake and State of Indiana, ready to be shipped to Chicago, that one Eldredge had contracted to purchase said wood at $6 per cord in the city of Chicago, when shipped, and that if Vehmeyer, the plaintiff, would advance to him at the rate of $5 per cord for the 200 cords of wood, he the defendant, would immediately ship said cord wood to the city of Chicago: that the plaintiff, Vehmeyer, relying upon the representation being true, advanced to the defendant said sum of $1,000;

"That the defendant shipped only the sum of 40 cords of wood to the said Eldredge, from which he, said Vehmeyer, received the sum of $6 per cord;

"That the representations of the defendant falsely, were false and fraudulent;

"That he did not have, nor never did have, in the county of Lake, and State of Indiana, 200 cords of birch cord wood piled up and ready for shipment to the city of Chicago, to said Eldredge, but only had, neither in the county of Lake, nor anywhere else, the sum of 40 cords of birch cord wood which was shipped by the said defendant to the said Eldredge.

"Wheretore the plaintiff asks damages to the extent of $1,500, and hence he brings this action of fraud and deceit against the defendant."

In view of the construction given by this court to the provisions of the bankrupt law as to discharge of the debtor, it is necessary that the court examine this declaration, to see whether it proves that the debt was *created by fraud* within the meaning of the bankrupt act.

The first averment towards such fraud is that "in order to induce plaintiff to advance him a large amount of money, (to wit: $1,200.)"

There is no suggestion that plaintiff did advance twelve hundred dollars, but only a less sum.

The substance of the averment is "a large amount of money," the videlicet only limits the amount to the sum named or less, and it might be any sum less than that named. The videlicet is only a parenthetical expression.

The second averment challenges scrutiny.

It begins with the words "falsely and fraudulently represented unto the plaintiff that he had a large amount

of birch cord wood (to wit: 200 cords) cut and piled up rear the Pittsburgh and Ft. Wayne, in the county of Lake, and State of Indiana, ready to be shipped to Chicago."

That was not a representation that he had 200 cords, but only a representation that he had a large amount, not exceeding 200 cords; and it was literally true if he had 40 cords at the place stated, ready as stated. (*Bouvier Law Dic. Videlicet;* 1 *Greenleaf Ev.*, §60; *Stephen on Pleading*, 318; *Brown* v. *Berry*, 47 Ill., 175, p. 177; *Shepard* v. *Ogden*, 2 Scam., 257, p. 259.)

If an action of assumpsit or trover had been brought laying damages at $1,200, averring that defendant bought or converted to his own use, a large amount, (*to wit:* 200 cords), at the price of, or worth, $6 per cord, etc., and general issue had been pleaded, and evidence given that plaintiff sold defendant 40 cords at $6 a cord, or that defendant converted to his own use 40 cords (the property of plaintiff), worth $6 a cord, the verdict in either assumpsit or trover would have been an unqualified verdict of *guilty*; and in either action the jury would have assessed the plaintiff's damages at $240. (*Tidd Pr.*, 869, 870.)

The amount under videlicet is satisfied by proof of a less amount. (*Straight* v. *Hanchett*, 23 Ill. App., 584, pp. 588-9; *Shepard* v. *Ogden*, 2 Scam., 257, p. 259.)

The third averment is: "That one Eldredge had contracted to purchase said wood at six dollars per cord, in the city of Chicago, when shipped."

It is noticeable that the witness started to testify that the averment was that *he* had contracted to sell to Eldredge, but he retracted that as wrong, and substituted that Eldredge had contracted to purchase said wood; that is—"a large amount, (to wit: 200 cords)," when it should be shipped.

It is also noticeable that *no one contracted to ship that or any wood to Eldredge.*

The fourth averment is: "that if the plaintiff would

advance to him at the rate of five dollars per cord for the 200 cords of wood, he, the defendant, would immediately ship said cord wood *to Chicago.*"

But it is to be noticed that *there was no suggestion that Vehmeyer should receive the wood, or have anything to do with it, or with any of the proceeds, or that Forsyth should sell it after it should reach Chicago.*

The fifth averment is: "That the plaintiff, Vehmeyer, relying upon the representations being true, advanced to the defendant said sum of $1,000."

It is to be observed that *Vehmeyer took no security upon the wood; that he asked no more right or interest in it or its proceeds than on defendant's clothing; and that defendant did not promise to pay him one penny that he might receive for it.*

The sixth averment is: That Forsyth actually shipped 40 cords of wood to Eldredge, from which Forsyth paid Vehmeyer $240.

(Whether this 40 cords was birch wood or where it was shipped from is not averred.)

The seventh averment is: "That the representations of the defendant falsely were false and fraudulent."

That is not an averment of fraud. What representations were averred to be "falsely" do not appear; but the averment is in effect that only such representations as were falsely made were fraudulent, without specifying any as false, except in the next subsequent averment.

The eighth averment is: "that he did not have, nor never did have, in the county of Lake and State of Indiana, 200 cords of birch cord wood piled up and ready for shipment to the city of Chicago *to said Eldredge*, but only had 40 cords of birch wood, which was shipped by said defendant to said Eldredge."

The whole sentence is to be taken together. *The words describing what he did not have are words of essential description. Forsyth may have had 200 cords of birch cord wood piled up and ready for shipment to Chicago* to himself, for all that there is in that averment. (Authorities *post.*)

The 2d averment had been that he represented to the plaintiff that he had a large amount of birch cord wood, not exceeding 200 cords, cut and piled up, ready to be shipped *to Chicago.* "This eighth averment is that he did not have 200 cords of birch cord wood piled up and ready for shipment *to Eldredge;* but that he did actually ship 40 cords to Eldredge. This admits that if he did not have 200 cords, he did have a large amount, not exceeding 200 cords (that is, to wit: 200 cords).

There was no averment that Forsyth had no other property in Illinois, or that this wood should be so placed that Vehmeyer could levy on it if he should get judgment.

The whole averment only amounts to a vague promise that if Vehmeyer would lend him $1,200 he would hurry around and get some goods into a market town, which he said he had in an adjoining county. And that was all.

Vehmeyer lent him $1,000, and did not seek in any way to connect the wood with the loan. He was to have no control of or connection with or security on it. The loan was a simple unsecured loan to Jacob Forsyth, for which he did not even take a promissory note.

If as collateral to that debt he had taken Forsyth's agreement to ship 200 cords of wood to Chicago and sell it, and pay the money over to him, and Forsyth had sold the wood and kept the money, all the above cases show that his discharge in bankruptcy would have been absolute; and this declaration shows nothing like an embezzlement, or fraud within the meaning of the bankrupt act.

The last clause of the declaration given is: "Wherefore the plaintiff asks damages to the extent of $1,500, and hence he brings this action of fraud and deceit against the defendant."

Those words "fraud and deceit" are no part of any averment, and have no effect at all, being mere surplusage.

Ayers v. Richards, 12 Ill., 146, p. 148.
Puterbaugh's Pl. Common Law, 6th Ed., 832.
2 Chitty's Pleadings 1–2, 4.

Upon that declaration with general issue pleaded, if Vehmeyer had proved that August 10, 1868, he loaned Jacob Forsyth $1,000, and had received $240 dollars from Forsyth, paid thereon, what would have been the Verdict?

Clearly: "We the jury find the defendant guilty; and assess the damages at $——" (naming the amount of money due.)

No evidence would have been required to be given upon any of the collateral averments, or upon any averment aside from those of the mere loan of the money.

Lusk v. Cook, Breese, 84.
Burnap v. Wight, 14 Ill., 301, p. 303.
Hiner v. Richter, 51 Ill., 299.
1 Chitty's Pleadings, 232, 233.

If the debt had been created by fraud, it could not have been proved without proving the fraud. As the judgment proved could have been got, on that declaration, without any evidence of fraud, that judgment, read in evidence, is not evidence that the debt was created by fraud.

Wells on Res Adjudicata, Sec. 3, 203, 213, 214, 215, 216, 224, 226, 227.
2 Smith's Leading Cases. Hare & Wallace Notes, 794.
McCall v. Carpenter, 18 How., 297, p. 302.
Washington Packet Co. v. Sickles, 5 Wall., 580, p. 592.
Russell v. Place, 94 U. S., 606, pp. 608–610.
Wood v. Jackson, 8 Wend., 9.
Althrop v. Beckwith, 14 Ill. App., 628, pp. 632, 633, 634.
Mervin v. Lewis, 90 Ill., 505, p. 509.
Riverside Co. v. Townshend, 120 Ill., 9, pp. 17, 18.
Chicago v. Cameron, 120 Ill., 447, p. 459.
Atty. Gen. v. C. & E. R. R. Co., 112 Ill., 520, p. 539.
Umlauf v. Umlauf, 117 Ill., 580, p. 587.
1 Black on Judgments, Sec. 611, 624.

Warner v. *Cronkhite*, 6 Bissell, 453, supports the last above proposition with clear reason and authorities. It was decided in the Eastern District of Wisconsin:

At page 458 the court says: "Now in the case at bar what does the record show? The complaint in the action, in which the judgment sued on was rendered, shows a cause of action springing exclusively from alleged fraudulent representations *in an exchange of property*. It was not an action *upon contract, with immaterial allegations of fraud*, but it was an action grounded *solely upon the fraud.*

* * * *

As the record of the action shows *a material and traversable allegation of fraud as its sole foundation*, the debt or demand may fairly be said to be one of fraud, and the action to be one founded upon a debt or claim from which the bankrupt's discharge would not release him. *In re Whitehouse*, 4 Nat. Bankruptcy Register, 93."

The distinction is apparent: for the action of Vehmeyer against Forsyth in 1871, was upon a contract to repay money loaned, with immaterial allegations intended to give a color of fraud, and discredit the defendant: allegations which were not material or traversable. There is no form of pleading, in which the defendant could have traversed the so-called allegations of fraud, so as to bar the action. If Forsyth should have attempted to traverse the averments of fraud only, the plaintiff would have taken judgment *nil dicit*, on the contract, for the amount due on the loan. (1 Tidd. Pr., 562.)

Pages 458-9 (continuing): "*The distinction must not be ignored* between the question as it presents itself in the case at bar, and as it would be presented in a case where the allegations of fraud in the original action were incidental and immaterial." (The case of Vehmeyer v. Forsyth, sct.) * *

"Upon the record it would seem, that, *had there been no fraud, there could have been no claim*, and had there been no fraud, and consequently no claim, there would have been no judgment."

Thus the distinction between that case and the judgment of Vehmeyer v. Forsyth, is apparent. The claim in Vehmeyer's declaration on the contract of the borrower, was not at all affected by the supposed fraudulent representations. The declaration would have been as complete without any averment of such representations as it is with them in it, as printed above.

This is further made apparent by the review of certain New York cases:

Pages 459, 460, referring to *Wood* v. *Henry:* "In that case, the

defendants, as commission merchants, received certain property for sale from the plaintiff. They sold the property but did not account for the proceeds. These facts were alleged in the complaint, and so it appeared that the defendants acted in a fiduciary character. Judgment was taken by default. * *

A majority (6 to 2) of the court held that the allegations of the fiduciary character of the defendants were not traversable, and that no execution could issue against the person upon the judgment, because the cause of action did not necessarily import liability to arrest, the cause of action and cause of arrest not being identical. In other words, upon trial, proof of the fiduciary relation was not indispensable to recovery. Here is a plain distinction, between that case and this at bar; for here there could have been no recovery without proof of the alleged fraud, for the fraud was the entire basis of the action. It was in short the sole cause of action.

Prouty v. *Swift*, 51 New York, 594, is in character and principle like *Wood* v. *Henry*, while *Roberts* v. *Trosser*, 53 New York, 260, enforces the principle applied in the case at bar as distinguished from the other cases cited."

Page 461: "In the case of *Palmer* v. *Preston*, 45 Vermont, 154, cited by defendants' counsel, the action was upon contract. *Fraudulent representations had been made to procure a certain indorsement*, but the fraud was not the foundation of the judgment."

This Vermont case seems to be like the one supposed in the declaration of Vehmeyer v. Forsyth (of 1871), which alleges that certain supposed fraudulent representations were made by Forsyth to procure the loan of the money, but they were not the creation of the debt, or even necessary to the cause of action or judgment.

The cases so cited and reviewed by the United States Court for Wisconsin (when both Judge Drummond and Judge Davis participated in the preparation of opinions on such general points, for precedents in the circuit) contain some matters peculiarly applicable to the consideration of the evidence in this case, held by the Illinois courts to prove that the debt of Forsyth was created by fraud, which may be cited from the reports themselves.

Whitehouse, petitioner, 4 National Bankruptcy Register, 63 (published as a leading case in 29 Federal Cases, 1,032).

LOWELL, J. (with Judge Shipley): "The bankrupt was arrested on an execution issued from the Superior Court. The record of that court, if admissible, shows that the judgment was based upon a verdict rendered in an action for deceit, and was rendered before the bankruptcy.

* * * * *

"The civil action, in which he is arrested, is distinctly and *solely* founded on fraud, and so is within the equity of the exception of section 33.

* * * * *

"We are of opinion that the record of the action * shows *a material and traversable allegation of fraud as its sole foundation.*"

Wood v. Henry, 40 N. Y. (1 Hand.), 124: A declaration or complaint alleged that defendants, as commission merchants, received certain property from plaintiffs, for sale; that they sold the property and kept the money. Judgment was taken by default. Executions against the bodies of defendants were issued, which were set aside by the trial court (pp. 124, 125), and that order having been affirmed by the Supreme Court at general term, was removed into the Court of Appeals. In affirming the judgments, the Court of Appeals said:

Page 128: "In the present case it may have been wholly impossible for the defendants to deny that they owed the money claimed by the plaintiff, or that the consideration of the indebtedness was the receipt of moneys arising from the sale of the plaintiff's goods. And yet they may be quite able to show that they were not commission merchants, and that the circumstances under which they acted did not establish any fiduciary relation between them and the plaintiffs, but the relation of debtor and creditor merely. If so, then by no possible answer which the defendants could truthfully interpose could they have prevented judgment for the plaintiff for the amount claimed. Admitting the debt, they could not demand a trial to determine the extrinsic facts, when the jury must necessarily have found a verdict for the recovery of the money. We have no provision for the trial of such collateral questions, and no warrant for a judgment other than that the plaintiffs recover so much money, with costs."

That precisely expresses Forsyth's predicament when summoned on the above copied declaration of 1871.

In *Prouty* v. *Swift*, 51 N. Y., 594, the opinion is by the only judge who dissented on this point in *Wood* v. *Henry*, and refers to a declaration much like that of Vehmeyer v. Forsyth, of 1871.

Page 601: "The only other question remaining to be considered is raised by the exception to the referee's finding of law, that the defendants acted in a fiduciary character, within the meaning of subdivision 2 of Sec. 179 of the code.

That was not warranted by the issues which he was called upon to try. The character or nature of defendants' employment was not an issuable fact. This I deem to be settled by the decision of *Wood* v. *Henry*, 40 N. Y., 124. It was wholly immaterial to the plaintiffs' right of recovery, whether the legal liability, which the defendants had incurred, resulted from a fiduciary re-

lation, or that of debtor and creditor merely, in the ordinary and common acceptation of those terms. The action was, substantially, so far as it related to the demand for the recovery of the money in question, one for money had and received to and for the plaintiffs' use; and he would have been entitled to a judgment therefor, notwithstanding a finding by the referee (in case he had so found) that the defendants did not act in a fiduciary capacity."

Roberts v. *Prosser*, 53 N. Y., 260, was decided as follows:

Page 263: "Wood v. Henry, 40 N. Y., 124, * went upon the ground that a recovery might have been had under the allegations of the complaint without showing any fiduciary relation between the parties. In the action now in question it is very clearly otherwise."

Palmer v. *Preston*, 45 Vermont, 154, goes upon the same distinction. The question decided was that the debtor was discharged by his certificate in bankruptcy.

Page 156: The vital question in the case is whether the debt sought to be collected in this suit was created by fraud. If so, the defendant's discharge in bankruptcy is no bar to the enforcement of its payment by the court.

If the record of the judgment in suit is examined, it will be found, that the debt, evidenced by the judgment, was created by the contract which the defendant entered into.

Page 157: "The defendant would not now be allowed to impeach the judgment, by showing *that no such contract, as the record of the judgment discloses*, existed between the testatorand himself, or that the indebtedness, evidenced by the judgment, was created by fraud, *and not by contract*."

Page 158: The court quotes from the case of *Whitehouse*, where it holds, that ifthe declaration shows a material and traversable allegation of fraud as its *sole foundation*, the debt or demand may fairly be said to be founded on fraud: but proceeds on page 159 to follow the decision of Judge Nelson (of this court), that where the judgment shows that the debt sought to be enforced was *created by contract* (and not by fraud) it imports verity, and the plaintiff cannot afterwards claim that it was created by fraud, even though in his declaration, on which that judgment was obtained, he had alleged any amount of fraudulent statements of the debtor, to induce the creditor to enter into the contract, on which he had obtained his judgment.

These cases lead to the conclusion (as shown in *Prouty* v. *Swift*), that the court, in the trial of 1871, upon the above printed declaration, at issue by any plea that could put it at issue, would have entered judgment for the plaintiff, if the jury had found the following special verdict:

We the jury find that on the 10th day of August, 1868, the plaintiff (Vehmeyer) loaned one thousand dollars to the defendant (Forsyth), that to induce the plaintiff to advance said money to him, the defendant represented unto the plaintiff that he had

a large amount of birch cord wood cut and piled up near the Pittsburgh, Fort Wayne & Chicago Railway, in the county of Lake and State of Indiana, ready to be shipped to Chicago; that one Eldredge had contracted to purchase said wood at six dollars per cord, in the city of Chicago, when it should be shipped into said city; and that if Vehmeyer the plaintiff would advance to him five dollars per cord for two hundred cords of said wood, he (defendant) would immediately ship said cord wood to the city of Chicago; that the plaintiff (Vehmeyer) relied that the representations of the defendant were true, and believed that he would do as he agreed; that at the time stated, said Forsyth had more than two hundred cords of birch cord wood, cut, and piled up near said Railway, at the place stated, ready to be shipped to Chicago; that one Eldredge had contracted to purchase said wood in the city of Chicago, at six dollars per cord, from time to time, and whenever it should be shipped into said city; that a few days after said loan was made, said Vehmeyer offered to receive said wood in the city of Chicago for said Forsyth, and sell and deliver the same to said Eldredge upon payment by said Eldredge from time to time of the sum of six dollars per cord therefor, as he had contracted with said Forsyth; that thereupon said Forsyth began shipping said wood to said Vehmeyer in said city of Chicago, and said Vehmeyer so received from said Forsyth and sold to said Eldredge, under said contract 45 cords of said wood for which he received six dollars per cord, amounting to $270; that said Eldredge then being unable to procure cars for transportation of said wood to his lime kilns, refused to purchase or receive any more of said wood; and said Vehmeyer notified said Forsyth, and directed said Forsyth to ship no more of said wood to him, said Vehmeyer. Said Forsyth never shipped any of said wood to said Eldredge. That deducting his charges for receiving and selling said wood, said Vehmeyer has credited to said Forsyth the sum of $166.65 out of said $270 so received.

If upon the foregoing facts the law is with the plaintiff, we find for the plaintiff and assess his damages at $833.35; and if the law is with the defendant we find for the defendant.

Upon that verdict the court would have entered judgment for the plaintiff.

It seems to be demonstrated that the averments of the declaration supposed to show fraud, are immaterial, not traversable, and that the judgment does not tend to show that the debt was created by fraud within the meaning of the Bankrupt act.

The law is, that the burden of proof as to the former issue is on the person who sets up the judgment, and *he must make it clear and decisive* (WELLS *on Res. Adj.*, Sec. 215); and "*a judgment is* NO EVIDENCE *of matter to be inferred from it by argument.*" (WELLS on *Res Adjudicata*, Sec. 216.)

"*A judgment is* NO EVIDENCE *of a matter which comes collaterally in question merely, nor of matter incidentally*

cognizable, or to be inferred only by argument, or construction, from the judgment."

Lawrence v. Hunt, 10 Wend., 80, pp. 83, 84.
Wells on Res Adjudicata, Sec. 200, 201, 202, 224.
Broom's Legal Maxims, 335.
2 Smith's Leading Cases, Hare & Wallace Notes, 793 (*677).

It is apparent that the question at issue and tried in the case of Vehmeyer v. Forsythe in 1871, was not the same question which is at issue in the present suit, upon the averments to overcome the effect of a discharge in bankruptcy in 1880, duly pleaded and proved.

In 1871 there had been no proceedings in bankruptcy, and the question whether the debt had had been "created by fraud" according to the true intent and meaning of the bankrupt act could not have arisen.

To make the judgment of 1871 an estoppel and res adjudicata on that point, that point must have been *a vital issue* on the former trial, as said by Black in Sec. 226 above quoted. It could not have been an issue at all; and whether that judgment was for tort or on contract is wholly immaterial to the question and issue raised for the first time (for the confession and avoidance of the plea of discharge), by the reply that *the debt alleged was created by fraud within the meaning and intent of the bankrupt act.*

To apply the maxim, *transit in rem judicatam*, it is essential that the question decided in the former action be *the same question* now raised; it must be *the same point.* "The conditions * * are, that *the same identical matter* shall have come in question already in a court of competent jurisdiction, that the matter shall have been controverted, and that it shall have been finally decided." "The judgment * * *directly upon the point*, is * conclusive between the same parties, upon the same matter directly in question in another court, * * (or) coming incidentally in question in another court, for a different purpose. *But neither* the judgment of a concurrent or exclusive jurisdiction *is evidence of any matter which came collaterally in question* * * *nor of any*

matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.

BROOM'S LEGAL MAXIMS, 328, 331, 334, 335.

It is not necessary to the conclusiveness of the former judgment, that issue should have been taken upon the precise point which is controverted in the second trial; it is sufficient, if that point was *essential to the finding of the former verdict.*" (1 GREENLEAF ON EV., Sec. 534.)

That the debt of Forsythe was created by fraud within the intent and meaning of the bankrupt act, was not a point *essential* to the finding of the former verdict. Even the point that there was any fraud at all in obtaining the credit by Forsyth was not a point *essential* to the finding of the former verdict; that point could only be inferred by argument from the declaration and judgment; it was only incidentally cognizable by the jury because it was suggested in the declaration, but as it was not essential to the finding of the verdict which the jury found, nor to the judgment which was entered, it only came collaterally in question.

Let us return to a more comprehensive analysis of this declaration, which will further demonstrate that *there was no fraud, in the creation of the debt, alleged in that declaration.* The declaration is that—

"To induce plaintiff (Vehmeyer) to advance him (Forsyth) a large sum of money, (to wit: the sum of twelve hundred dollars)—falsely and fraudulently represented unto the plaintiff, that he had a large amount of birch wood (to wit: two hundred cords) cut and piled up near the Pittsburgh and Ft. Wayne in the county of Lake and State of Indiana, *ready to be shipped to Chicago;* that one Eldredge had contracted to purchase said wood at six dollars per cord in the city of Chicago when shipped; and that if Vehmeyer, the plaintiff, would advance to him at the rate of five dollars per cord, for the two hundred cords of wood, he, the defendant, would immediately ship said cord wood *to the city of Chicago.*"

"That the plaintiff, Vehmeyer, relying upon the representation being true advanced, to the defendant, said sum of one thousand dollars."

There is no averment that the defendant did not have a large amount of birch wood cut and piled up as stated ready to be shipped to Chicago. There is no averment that he did not have two hundred cords so ready to be shipped *to Chicago.*

There is no averment that Eldredge had not contracted *to purchase* said wood, at six dollars per cord, *in Chicago,* when shipped.

There is no averment that Forsyth did not immediately ship said cord wood *to the city of Chicago.*

NOTE: The purchase by Eldredge was to be *in Chicago;* the wood was to be shipped to Forsyth himself or to some agent for him; and if Eldredge should purchase, as he had contracted to do, he would pay cash on delivery of the wood. Eldredge was neither to pay for the wood before its delivery; nor was Forsyth to allow the carrier to deliver the wood to Eldredge without payment of the price of the wood.

The only averment having the form of a traverse of the alleged representations, lacks the substance, it is as follows:

"That the representations of the defendant falsely were false and fraudulent; that he did not have, nor never did have, in the county of Lake and State of Indiana *two hundred* cords of birch cord wood, piled up, and ready for shipment to the city of Chicago, *to said Eldredge;* but only had forty cords of birch cord wood, which was shipped by the said defendant, *to said Eldredge.*"

NOTE: That averment was true if he had an hundred and ninety-nine cords; or if he had two hundred cords, and it was not all piled up; or if he had it piled up for shipment to Chicago to himself, or to any one else, to be sold to said Eldredge according to his contract to purchase it *in Chicago.* That averment was true if forty cords were delivered to Eldredge, and he refused to take any more.

The qualifying words, are specific words, they limit the general words; they are necessary to be considered

to determine what was averred; and those words being considered, the averment does not traverse the truth of the statements Forsyth is alleged to have made to induce the loan of the money. (*Bally* v. *Kenrick*, 13 Price, 291; *Tipping* v. *Clark*, 2 Hare, 383, 390; *King* v. *Ray*, 11 Paige, 235, 239; *Davis* v. *Mapes*, 2 Paige, 105, 106.)

In an answer in chancery, to an interrogatory in the bill, a negative pregnant, will only evade the question: an answer which adds *a qualification* to the matter alleged or traversed evades the allegation and is impertinent (*Ibidem*, *Cooper's Equity*, 313; *Mitford's Eq.*, 250; 1 *Daniels Ch. Pr.*, 4th Ed., 725 and note), and certainly, where it is alleged that certain representations were made to induce a person to lend money, the declaration must traverse the truth of those identical representations, must state that the plaintiff relied on the truth of the representations, must state what of those representations were untrue, and cannot shift the ground, evading the truth of those representations, and substitute either a pregnant denial, which admits the truth of the general statement, or an averment that a different or qualified matter did not exist.

NOTE. That the averment, with the qualifying words, did not traverse the truth of the representations alleged to have been made by Forsyth (in that declaration of 1871) is illustrated by testimony actually given, and by testimony offered in the trial court in this case and contained in this record:

Robert C. Forsyth testified that he heard the instructions given to the jury (in the 1871 trial). That he heard the judge say that there had been no fraud proven, that Vehmeyer was receiving the wood, and declined to receive any more.

John Marshall testified that he was a witness on the trial of 1871, and remembered some of his testimony. Forsyth's attorney then offered to prove by him that he testified that Forsyth had more than the two hundred cords of wood at the time Vehmeyer claimed that he wanted it; that Vehmeyer was then handling and cutting wood for Forsyth at Cassello, Indiana; and that Vehmeyer instructed the witness not to ship any more wood

to him on account of Forsyth. Also that he had Vehmeyer testify at that trial, that he (Vehmeyer) had ordered Forsyth not to ship any more of the wood. (The court excluded this evidence.)

Jacob Forsyth being on the stand was asked, whether or not at the time the money is alleged to have been paid to him by Vehmeyer on account of this wood, he had 200 cords and more in his possession. This was coupled with an offer to prove by him that at that time he had more than the 200 cords of wood there, which he was ready and willing to deliver to Vehmeyer; and that after about 45 cords of this wood had been shipped he ordered Forsyth not to ship any more, because he (Vehmeyer) could not get cars to reship it, etc.

Non constat but the declaration of 1871 was drawn with its peculiar wording, because Vehmeyer could not deny that every representation made by Forsyth when he borrowed the money was true; and that seems very probable in view of the above testimony given, and that offered with the witnesses upon the stand to answer the questions asked, and excluded.

SECOND.

The courts of Illinois erred in excluding the evidence offered by Forsyth, tending to show that the judgment, of 1871, was upon the debt only and did not embrace a question whether that debt was created by fraud within the meaning and intent of the provision of the bankrupt law of the United States.

Defendant offered competent evidence tending to show that the plaintiff, Vehmeyer, did not make any claim of fraud on the trial in 1871, and that such point or question was not adjudicated at that trial; and that Vehmeyer himself testified that Forsyth had the wood and shipped part of it, and he (Vehmeyer) stopped him from shipping more.

These offers of evidence assumed a variety of forms.

It also appears that defendant (Forsyth) offered to prove by competent evidence that the court instructed

the jury that no fraud had been shown in the case, and that it was the duty of the jury, simply to determine the amount, if any, which Forsyth owed to Vehmeyer.

Exclusion of the evidence was error.

Wells on Res Adjudicata; Sec. 200, 201, 215, 216, 297, 302.

Lawrence v. Hunt, 10 Wend., 80, p. 84.

Wood v. Jackson, 8 Wend., 9, p. 36.

2 Black on Judgments, Sec. 624.

1 Greenleaf on Ev., Sec. 532.

"Whenever a judgment in a former action is relied upon as conclusive of a particular point or question, it may be shown by extrinsic evidence, not inconsistent with the record, that such point or question was not adjudicated in that action, if in law the judgment could have been rendered on any other ground."

2 Black on Judgments, Sec. 628.

"Though the declaration in the former suit may be broad enough to include the subject-matter of the second action, yet, if upon the whole record it remains *doubtful whether the same subject-matter was actually passed upon*, it seems that parol evidence may be received to show the truth."

1 *Greenleaf on Evidence*, Sec. 532.

Greenleaf divides the section here, and proceeds: "So also, if the pleadings present distinct propositions," showing that the clause above quoted applied to where the propositions are not distinct, and judgment may be given on proof of part of the averment, as in the instance at bar where it could be given on proof of the loan without any evidence of any fraud to induce the loan.

The courts of Illinois erred in excluding testimony as to what evidence was given on the trial in 1871.

In *Hitchin* v. *Campbell*, 2 W. Bl., 827, at page 831, the court says:

"But the principal consideration is, whether it be precisely the same cause of action in both, appearing by

proper averments in a plea; or by proper facts stated in a special verdict, or a special case. One great criterion of this identity is that the same evidence will sustain both the actions. Putt v. Royston, 2 Shaw, 211; Payne, 472; 3 Mod., 1; Polfexen, 634; Mortimer v. Wingate, Moore, 463; Bro., Action on the case, 97, 105. These relate to the whole of the demand; but the same reasoning extends to a part of it only; as 4 Co., 92 b, Slade's case."

"Lord Eldon, Ch. J., said that this was the true test. Martin v. Kennedy, 2 Bos. & P., 71."

Wells on Res Adjudicata, Sec. 201, 203.

Washington Packet Co. v. *Sickles*, 5 Wallace, 580, where it cites

Wood v. *Jackson*, 8 Wend., 36, etc.

The instructions of the court, by which the case was submitted to the jury were competent evidence of what was submitted for their judgment. The jury were bound to follow such instructions. The court, in sending them out to deliberate, may have instructed them: "There is no evidence tending to show any fraud, and you have nothing to do with any claim of fraud: all you have to decide is whether Vehmeyer lent Forsyth money, and if so how much, and to deduct $240 for wood that Vehmeyer admits he has received from Forsyth.

If you find that Vehmeyer did not lend Forsyth any money the form of your verdict will be: 'We the jury find the defendant not guilty.'

If you find that Vehmeyer did lend Forsyth money, the form of your verdict will be: 'We the jury find the defendant guilty, and assess the plaintiff's damages at $———;' naming the amount you find due."

If the court so instructed the jury on the case, that shows the precise matter adjudged by the jury. *It is the province of the court* to determine what are the actual issues,—on what questions there is any evidence, and to limit their consideration to those matters.

Judge MERRIFIELD (who tried the case in the Illinois

courts) has prepared the following specific reply to the brief in support of the motion to dismiss the writ of error:

> Counsel for defendant in error advance this proposition: "It is apparent on the face of this record that no question of law "raising" (involving) "any Federal question was decided in this case; and that the decision in the Supreme Court of Illinois adverse to the defendant was solely upon questions of fact. The validity of the Bankrupt Act of 1867 was not denied. The right of the defendant by virtue of having been discharged under that law to all protection and immunity given by that law was not questioned. The law itself provides (Bankrupt Act of 1867, U. S. Rev. Statutes, Sec. 516) that 'no debt created by the fraud or embezzlement of the bankrupt * * * shall be discharged by proceedings in bankruptcy,' etc. The only question raised in this case relating to the statute of the United States was whether or not the claim sued upon was based upon the fraud of the defendant. This was purely a question of fact put at issue by the pleadings and to be determined upon the evidence in the case."

That is to say, the question whether a certain state of facts constitutes fraud within the meaning of that term in the statutes of the United States, cited, is not a question of law at all, but a simple question of fact, in reference to which, this court is precluded, by the judgment of the state court, from making a decision. The proposition, when thus nakedly but fairly and fully stated, would scarcely seem worthy of serious attention.

The cases cited by counsel for defendant in error are either not in point or unfavorable to their proposition.

In *Dower* v. *Richards*, 151 U. S., 658, Mr. Justice GRAY delivering the opinion of the court, says: "When indeed the question decided by the state court is not merely on the weight or sufficiency of the evidence to prove the fact, but of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this court. It was accordingly said by Mr. Justice CATRON: 'The powers of the Supreme Court are limited in cases coming up from the State Courts under the 25th section of the Judiciary Act to questions of law, when the final judgment or decree draws in question the validity of a treaty or statute of the United States, etc., or where *their construction* is drawn in question or an authority exercised under them; and as the admission of evidence to establish the mere fact of a boundary in re-

gard to the extent of a grant can not raise a question involving either the validity or construction of an Act of Congress, etc., this court has no jurisdiction to consider and revise the decision of a state court, however erroneous it may be, in admitting the evidence to establish the fact; but when evidence is admitted as competent for this purpose and it is sought to give it effect for other purposes which do involve questions giving this court jurisdiction, then the decisions of the state courts of the effect of such evidence may be fully considered here and their judgments reversed or affirmed in a similar manner as if a like question had arisen in the Supreme Court of Error of a state when reversing the proceedings of inferior courts of original jurisdiction."

"*Macky* v. *Dollon*, 4 How., 421, 447: The only question considered in that case arose upon a bill of exceptions to the legal competency of evidence relied on to prove a title under an Act of Congress." From the concluding statement of the opinion it appears that this court held they could not review the decision of the state court upon the question of fact whether a certain gold ledge in controversy at the time when a certain town site patent took effect was known to be valuable for mining purposes; and the only question of federal law in the case having been rightly decided by the court below, this judgment was affirmed.

In *Egan* v. *Hart*, 165 U. S., 188, the finding of the trial court assented to by the Supreme Court of the state, was that the stream across which the dam complained of was erected was non-navigable; and this was held to be a finding of a fact, which was conclusive, and afforded ground broad enough on which to maintain the judgment below, independent of any federal question, and this court was consequently without jurisdiction.

The case of *Bartlett* v. *Lockwood*, 160 U. S., 357, is too obviously inapplicable to need any attention. The same remark applies to *Quinby* v. *Boyd*, 128 U. S., 480; *River Bridge Company* v. *Kansas P. R. Co.*, 92 U. S., 315; *Martin* v. *Marks*, 97 U. S., 345; *Kenney* v. *Effinger*, 115 U. S., 577.

There are a number of decisions of this court precisely in point, which are a complete answer to the contention of counsel for defendant in error.

The case of *Neal* v. *Clark*, 95 U. S., 704, was brought into this court on a writ of error to the highest court of the State of Virginia. The only question involved in the case was precisely like that involved here, namely, the meaning of the word fraud in the 33d section of the Bankrupt Law of 1867. The court below found and held that Neal, the plaintiff in error, was not entitled to the benefit of his discharge in bankruptcy because he had been guilty of constructive fraud in buying assets from the executor of the estate at a discount when the needs of the estate did not require it. On this question this court differed from the Supreme Court of Appeals of the State of Virginia and reversed their judgment. So, too, in *Hennequin* v. *Clews*, 111 U. S., 676. The only question decided by the court below was, that one hypothecating (to secure a debt due from himself), securities which had been pledged to him to secure the obligations of another, and failing to return them, when such obligation was discharged, did not thereby create a debt by fraud or in a fiduciary capacity which is exempted by Section 5,117 Revised Statutes from the operation of a discharge in bankruptcy.

The Superior Court of the City of New York rendered this judgment, from which an appeal was taken to the Court of Appeals of New York, which affirmed the judgment and remitted the record to the Superior Court of the City of New York, to which court accordingly the Writ of Error from this court was directed. The judgment of the Court of Appeals was affirmed by this court, not on the ground that it was conclusive and precluded this court from jurisdiction, but on the ground that it was sound in principle and a correct construction of the law, as it had been construed in a number of cases by this court.

Palmer v. *Hussey*, 119 U. S., 96, was also a Writ of Error to the Supreme Court of the State of New York. The record shows that on the 18th of April, 1874, Palmer recovered a judgment in the Supreme Court of New York against Hussey for $32,128.57, on account of certain bonds of the United States which had been placed in the latter's hands by Palmer, for which he gave a writing showing that he held the bonds subject

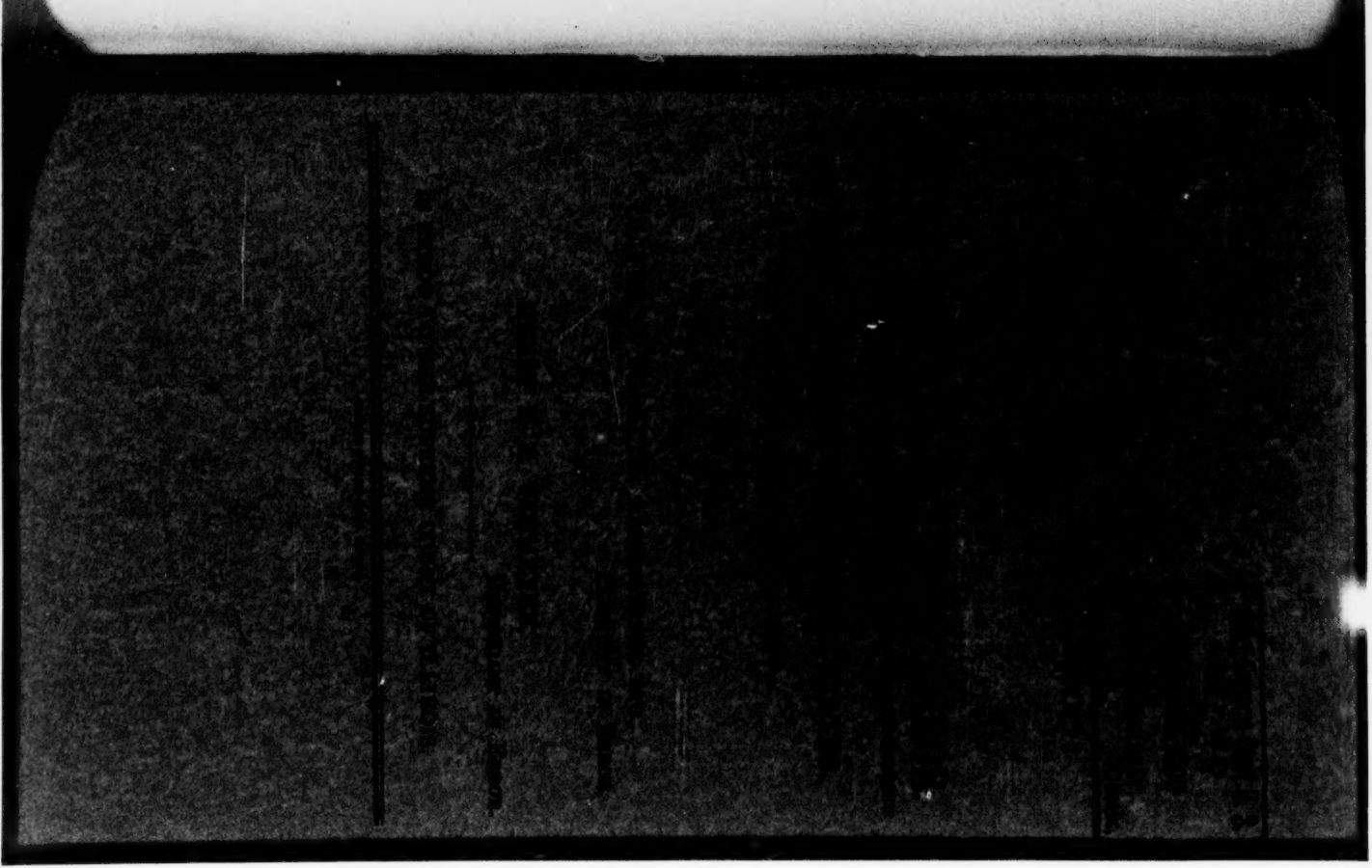
to the order of said Palmer at ten days' notice, and that he was to collect the coupons free of charge, etc. The complaint set forth the writing, and alleged that the bonds were received by the defendant from the plaintiff as his agent and broker in a fiduciary capacity, upon the agreement and arrangement contained in said writing: "That the defendant, without the authority or permission of the plaintiff, has fraudulently and wilfully sold and disposed of and misapplied the said bonds and has refused to deliver up the same to said plaintiff, who has frequently demanded the same from him and given the notice so to do," etc. The complaint was denied by the Answer. In May, 1880, Hussey received his final discharge in bankruptcy, and in June following he moved the Supreme Court to enjoin the collection of the judgment in favor of Palmer because of said discharge. The Supreme Court (both special and general term) denied the motion on the ground that the judgment on its face showed that the debt was created by fraud, and while Hussey was acting in such a fiduciary capacity as to prevent the discharge in bankruptcy from operating as a release. This order on appeal was reversed by the Court of Appeals, and the execution of the judgment perpetually enjoined because the fraud and trust established by the findings were not of a character to bar the effect of the discharge in bankruptcy. To reverse that judgment a Writ of Error was sued out from this Court. Hussey moved to dismiss the Writ, on the ground that no Federal question was raised or decided, and with this motion he united a motion to affirm the judgment of the Court of Appeals. This court denied the motion to dismiss, and granted the motion to affirm. Mr. Chief Justice WAITE, delivering the opinion of the court, said: "Upon the facts as they appear in the record sought to be enjoined, it is clear that, under the ruling of this court in Hennequin v. Clews, 11 U. S., 676, there was no such fraud in the creation of the debt, and no such trust in respect to the possession of the bonds by Hussey as to bar the operation of the discharge.

Noble v. *Hammond*, 129 U. S., 65, is another case precisely in point against the contention of counsel for de-

fendant in error. It was a writ of error to the Supreme Court of Vermont. The action was brought in a County Court of Vermont; a discharge in bankruptcy was pleaded by the defendant; but the court instructed the jury that the defendant was entitled to no benefit from his discharge on the ground that he had received the money in question in a fiduciary capacity. The Supreme Court of Vermont affirmed the judgment of the County Court, on the ground that, while the instruction of the court below was technically erroneous, it was harmless, because the act of the defendant in mingling the money with his own and using it was a wrongful and fraudulent act, which created a debt, that was not discharged by defendant's composition with his creditors, under the provisions of the bankrupt law. This Court reversed the decision of the Supreme Court of Vermont, and held that the facts in the record did not constitute "the actual positive fraud contemplated by the bankrupt act, and only such an implied fraud as is involved in most or all cases of conversion of property and breach of contract."

Upshur v. *Briscoe*, 138 U. S., 365, was a Writ of Error to the Supreme Court of the State of Louisiana, and involved a question of what are debts created by a bankrupt while acting in a fiduciary character so as not to be discharged under Section 33 of the Bankrupt Act of March 2d, 1867, Chapter 176. This case, as the others, clearly shows that the Writ of Error in this case was properly issued.

EDWARD ROBY and
THOMAS J. MERRIFIELD,
Counsel for Plaintiff in Error.



Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

No. 180.

OLIVER O. FORSYTH, ADMINISTRATOR, ETC.,
Plaintiff in Error,

vs.

HENRY F. T. VEHMEYER,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR PLAINTIFF IN ERROR.

In the haste of preparing the brief against the motion to dismiss or affirm, the undersigned could not reach the transcript and was obliged to depend on an abstract made by another hand.

The transcript now being printed shows that the case of appellant is much stronger than that abstract had exhibited it, and requires that a statement of the case be now made from the transcript itself.

STATEMENT.

Writ of Error to *Supreme Court of Illinois* (Trans., p. 1, Marg. p. c), brings up a judgment of that court entered October 24, 1898 (Trans., p. 90, Marg. p. 161), affirming a judgment of the *Appellate Court of Illinois* (First District) entered April 18, 1898 (Trans., p. 87, Marg. p. 156), affirming a judgment of the *Superior Court of Cook County, Illinois* (Trans., p. 20; Marg. p. 34), in favor of Henry F. T. Vehmeyer against Jacob Forsyth for $833.35 debt and $2,076.90 damages and costs, entered June 24, 1897.

Transcript 97, Marg. p. 172. *Petition* to the Chief Justice of the Supreme Court of Illinois for allowance of the writ of error alleged the following ground for bringing the cause to this court:

"*The decision of the cause is, that the discharge in bankruptcy of Jacob Forsyth, duly granted by the District Court of the United States in and for the District of Indiana, which was duly pleaded to the action and proved, is not sufficient to bar the action, and the case is within the jurisdiction of the Supreme Court of the United States, for review thereof by writ of error.*"

This petition was allowed by the Chief Justice of Illinois, by order endorsed thereon. (Trans., 97, p. 172.)

It is necessary to pick out the pleadings on which the judgment was entered in the Superior Court of Cook County January 24, 1897, which is here under review.

The transcript shows that Vehmeyer filed a præcipe in debt and *a declaration* against Forsyth February 24, 1891 (Trans., 5-6; Marg. pp. 3, 5), upon an alleged judgment entered at the June term, A. D. 1871, of the same court; alleging that the record was destroyed in the great Chicago fire of October 9, 1871.

Defendant Forsyth filed three pleas on April 8, 1891. (Trans., 7; Marg. p. 7.) The first plea was *nil debet;* the second *nul tiel record;* the third *discharge in bankruptcy.*

Plaintiff on December 18, 1891, *demurred* to the first plea; *replied* the record to the second plea, and concluded to the country; and *replied* double to the third plea, namely: First replication, debt created by fraud; second, no record of alleged discharge in bankruptcy. (Trans., 8; Marg. pp. 9-12.)

The demurrer to the first plea was sustained by the court. (Trans., 10; Marg. p. 12.)

Defendant having demurred to the replications (Trans., 10; Marg. p. 10), amendments were allowed, and defendant was ruled to rejoin. (Trans., 11; Marg. p. 15.)

Rejoinder concluding to the country (Trans., 12; Marg. p. 16) put the case at issue (similiter being waived) and the case went to a judgment against the defendant Feb-

ruary 21, 1894; from which he *appealed* to the Appellate Court of Illinois (Trans., 13; Marg. p. 19); the appeal in Illinois in common law cases having the effect of a writ of error.

The mandate of the Appellate Court is not among the files (Trans., 13; Marg. p. 20); but on January 2, 1895, on motion of defendant and due notice to plaintiff the *Superior Court* ordered that the cause be redocketed in that court (Trans., 14; p. 20); and on January 31, 1895, *on motion* of plaintiff, leave was given him to file *an amended declaration*, and defendant was ruled to plead thereto within ten days. (Trans., 14; Marg. p. 21.)

This begins the pleading which made the issue, on which the judgment was entered June 24, 1897, which has been brought to this court by this Writ of Error.

The following show said pleadings:

DECLARATION filed January 31, 1895.
(Trans., 14; Marg. p. 22.)

Plaintiff Vehmeyer complains of Jacob Forsyth, defendant, in a plea of debt—For that, whereas the plaintiff in the July term, A. D. 1871, of said Superior Court, recovered against the defendant in an action on the case the sum of $833.33 damages, and $6.75 costs, as by the record which was remaining until the destruction thereof by fire in October, 1871, did more fully appear; and which judgment still remains in full force.

(There is the usual conclusion.)

Ordered by the court (the parties agreeing) that the defendant's second and third pleas heretofore filed to plaintiff's original declaration stand, to said amended declaration.

The second plea (that there was no record of the alleged judgment of 1871) and an additional plea filed by defendant, and the demurrer thereto and order sustaining the same (Trans., 17-20) may be disregarded.

PLEA OF DISCHARGE IN BANKRUPTCY.
Transcript, 7; Marg. p. 7.)

The third plea, aforesaid, set up in manner and form

prescribed by the act of congress, a discharge in bankruptcy in the statutory form, granted to Jacob Forsyth December 30, 1880, in the District Court of the United States for the District of Indiana.

The plea concludes with a verification.

REPLICATION.

(Transcript, 8; Marg. p. 10.)

(NOTE: *This reply is here copied in haec verba,* after the words *precludi non,* because the burden was on the plaintiff to *aver* facts establishing that the debt was *created* by the fraud of the defendant, and *to prove the facts alleged;* and *this replication does not allege facts establishing that the debt was created by the fraud of the defendant.*)

And the plaintiff, as to the plea of the defendant, by him thirdly above pleaded, says *precludi non, etc.,* "because he says that the action, wherein the judgment mentioned in the plaintiff's declaration in this case was recovered against said defendant, was brought by the plaintiff against the defendant in the said Superior Court of Cook County to recover damages claimed, by the plaintiff in said action, to have been sustained by said plaintiff, by reason of alleged fraud practiced by the defendant upon said plaintiff, by which the plaintiff was induced to advance and pay to the defendant a large amount of money, to wit: about the sum of $1,200, by the false and fraudulent *representations* of the defendant, *that he,* the defendant, *owned and had in his possession, ready for delivery, a large quantity, to wit: 600 cords of cordwood in Lake County in the State of Indiana;* and that the said action, and the right to recover therein were founded solely upon the *said* fraud of the said defendant. And the plaintiff avers that issue was joined in that action by the parties thereto, upon the material allegations *so made* by said plaintiff therein in respect to said fraud; and that a trial by a jury was had therein; and a verdict, upon the issues *so joined,* was rendered therein in favor of the plaintiff, and against the defendant for said sum of $833.33, as the damages which had been sustained by said plaintiff by reason of said alleged fraud of the defendant. And the plaintiff avers that the judgment here-

inabove set forth in the plaintiff's declaration was entered and rendered by said Superior Court of Cook County upon said verdict aforesaid; and was founded solely upon the fraud practiced by the defendant, *as aforesaid*, upon said plaintiff. And plaintiff avers that said judgment in his said declaration set forth is a debt or claim, which is by said act, in defendant's third plea mentioned, excepted from the operation of the discharge in bankruptcy, which is by said defendant in his said third plea pleaded and set forth; and the plaintiff was not by virtue of his said discharge in bankruptcy, in said third plea pleaded discharged from the debt or claim of the judgment mentioned and set forth in plaintiff's declaration herein. And this plaintiff is ready to verify.

A further replication alleged that there was no record of the supposed discharge, etc.

REJOINDER.

(Transcript, 12; Marg. p. 16.)

Defendant's rejoinder traverses each averment of said replication, and concludes to the country.

TRIAL AND JUDGMENT.

(Transcript, 20; Marg. p. 34.)

June 24, 1897.

By agreement of parties the cause is submitted to the court, for trial without a jury.

The court finds the issues for the plaintiff, and that there is now due and owing from the defendant to the plaintiff the sum of $833.35 debt; and assesses the plaintiff's damages at the sum of $2,076.90.

Whereupon defendant enters his motion for a new trial.

After argument the motion is overruled.

Therefore it is considered by the court that the plaintiff do have and recover, etc.

Defendant having entered his exceptions, time is given to prepare his bill of exceptions.

REVISED STATUTES OF ILLINOIS, Chapter 110.

Sec. 41. In all cases, in any court of record in this state, if both parties shall agree, both matters of law and fact may be tried by the court; and upon such trial either party may, within such time as the

court may require, submit to the court written propositions to be held as law in the decision of the case; upon which the court shall write "refused" or "held," *as he shall be of opinion is the law,* or modify the same, to which either party may except, as to other opinions of the court.

Sec. 56. * * * if either party may wish to except to the verdict, or, for other causes, to move for a new trial * * * he shall before final judgment be entered, or during the term it is entered * * * file the points in writing * * * and final judgment shall thereupon be stayed until such motion can be heard by the court.

* * * *

In all cases where a new trial shall be granted on account of improper instructions having been given by the judge, or improper evidence admitted, or *because the verdict of the jury is contrary to the weight of the evidence,* or for any other cause not the fault of the party applying for such new trial, *said new trial shall be granted,* without costs, *as of right.*

Sec. 59. If, during the progress of any trial in any civil cause, either party shall allege an exception to the opinion of the court, and reduce the same to writing, it shall be the duty of the judge to allow said exception, and sign and seal the same; and the said exception shall thereupon become part of the record of such cause.

Sec. 60. Exceptions taken to the decisions of the court, upon the trial of causes, in which the parties agree that both matters of law and fact may be tried by the court, shall be deemed and held to have been properly taken and allowed; and the party excepting may assign for error before the Supreme (or Appellate) Court any decision so excepted to, whether such exception relates to improper, or rejecting proper testimony, or to the final judgment of the court upon the law and the evidence.

Sec. 61. Exceptions taken to the decisions of the court, overruling motions in arrest of judgment, motions for new trials, motions to amend and for continuances of causes shall be allowed; and the party excepting may assign for error any decision so excepted to.

This statute has received construction by the Supreme Court of Illinois.

"Where the trial is had by the court,—as to the facts the court stands in the place of the jury—and the decision will be reversed or affirmed by the same rules which govern when the facts are tried by a jury. (*Field* v. *C. & R. I. R. R. Co.*, 71 Ill., 458, p. 461.)

A new trial will be granted by the Supreme Court as of right, where the verdict of the jury is manifestly against the evidence. (*Southworth* v. *Hogg*, 42 Ill., 446, p. 449; *Coal Co.* v. *Lamprecht*, 51 Ill. App., 649; *I. C. R. R. Co.* v. *O'Keefe*, 154 Ill., 508, p. 511.)

In the case at bar the exceptions were saved, and the bill of exceptions was signed, sealed and made part of the record in apt time. (*The People* v. *Gary*, 105 Ill., 264, pp. 269-270; *Ferris* v. *Com. Nat. Bk.*, 158 Ill., 237, p.

239; *U. S. L. Ins. Co.* v. *Shattuck,* 159 Ill., 610, pp. 614-5.)

THE BILL OF EXCEPTIONS contains all of the evidence. (Trans., 79; Marg. p. 143.)

It states that "the plaintiff *to maintain the issues* upon his part introduced the following evidence."

James Frake, called by the plaintiff, testified: I am a lawyer. I have since 1869 been a practicing attorney in Chicago, Cook County, Illinois.

In 1870, as a partner in the firm of Bushnell & Frake, I brought the suit of Henry F. T. Vehmeyer against Jacob Forsyth, and I conducted the suit. (Trans., 24; Marg. p. 42.) I drew the declaration in one count. The effect of the question and answer is that he could not remember the contents of the declaration. It was: "Do you remember *the contents* of the declaration? A. Well—I remember *the substance* of it.

The declaration was filed July 21, 1870.

I have not a copy of the declaration.

It was burned in the Court House on the morning of October 9, 1871.

It is not possible to produce the original declaration *nor any copy of it.*

I did not preserve any copy made at the time.

I have reproduced, as fully and completely as I can, the contents of that declaration, and have it here. It is, to the best of my knowledge, belief and recollection, substantially a copy of that declaration, filed July 21, 1870, in the Superior Court. It was made about four years ago, in the fall of 1893 or thereabouts.

The attorney for the plaintiff stated: "It does not pretend to be a copy made from or by comparison with the original. It pretends to be from his personal recollection of what that declaration was—put in that form."

Of course the paper made up twenty-two years after the original declaration was destroyed was excluded both as evidence, and to refresh memory; but is referred to as it shows vividly the weakness and imperfectness of the testimony to the contents of the destroyed paper. And, as showing the little credence to be allowed such testimony, it is to be remembered that both by the common law, and

by the statute of Illinois (in force four months after the destruction, R. S., Ch. 116, Sec. 2) not only might the evidence have been perpetuated, but the court to which the record belonged would have restored the lost paper, from evidence of its contents, while it was fresh in memory. They waited till June 18, 1897, twenty-six years after the paper burned, and seventeen years after the debtor had been discharged in bankruptcy, and then attempted to prove that the debt was created by fraud, by the oral testimony of an interested witness, as to the contents of the burned paper.

Transcript 26: The testimony showed that the witness was not in fact giving a memory, of the lost paper, but what he thought it ought to have been, and what he wanted it to be, by consulting Puterbaugh's and Chitty's Pleadings, and the paper he made up in 1893.

He gave the following:

Superior Court of Cook County.

To the July Term, or of the August Term, 1870.

County of Cook and State of Illinois.

Henry F. T. Vehmeyer, by Bushnell & Frake, his attorneys, plaintiff, complains of Jacob Forsyth, defendant, summoned, etc., in a trespass on the case, for that whereas, heretofore, to wit: on the 10th day of August, 1868, *in order to induce the plaintiff to advance to him a large amount of money, to wit: the sum of* fifteen hundred dollars, I think the declaration would say *twelve hundred dollars, falsely and fraudulently represented unto the plaintiff that he had a large amount of* birch *cordwood, to wit: the sum of two hundred cords,* cut and piled up near the Pittsburgh and Fort Wayne, or, I should say—(Here the plaintiff's attorney cut in and said "that's right," and the witness continued) the Pittsburgh and Fort Wayne, *in the County of Lake and State of Indiana,* ready to be shipped to Chicago; that said wood was contracted, or, rather, perhaps—one Eldredge had contracted to purchase said wood at six dollars per cord in the city of Chicago, when shipped; and that if Vehmeyer, the plaintiff, would advance to him at the rate of five dollars per cord for the two hundred cords of wood, he, defendant, would imme-

diately ship said cordwood to the city of Chicago. That the plaintiff Vehmeyer relying upon these representations as being true, advanced to the plaintiff—(Here plaintiff's attorney again cut in with the words, "to the defendant," and the witness continued)—advanced to the defendant the said sum of—I think the declaration said the sum of twelve hundred dollars or one thousand dollars; that the said defendant shipped only the sum of forty cords of wood to the said Eldredge, from which the said Vehmeyer received the sum of six dollars per cord—I don't know whether it is right or not—that the representations of the defendant falsely, were false and fraudulent. That he did not have nor never did have in the County of Lake and State of Indiana two hundred cords of birch wood piled up ready for shipment to the city of Chicago, to sell said Eldredge, but only had, neither in the County of Lake or anywhere else—but only had the sum of forty cords of birch wood which was shipped by the said defendant to said Eldredge.

Wherefore the defendant was therein—(Here plaintiff's attorney cut in again with the words: "The plaintiff, you mean," and the witness continued)—Wherefore the plaintiff was damaged to the extent of fifteen hundred dollars, was the amount that was alleged in the declaration, and thence he brings this action of fraud and deceit against the defendant.

Defendant's attorney objected (Trans., 28; Marg. p. 49): I object to all the statements of the witness *pretending to make up an alleged declaration* in this case as he has recited them, on the ground that it simply purports to be a substantial copy made from the recollection of the witness some twenty years after the declaration was filed.

The objection was overruled and exception duly saved.

NOTE: It is clear that this is not a full, true, complete and perfect copy of the document which formed part of *the record* remaining in the Superior Court of Cook County before the fire of 1871, as the words of an exemplification of the proper officer, or even the oath of a witness who had made a copy or had compared a copy with the original, would have stated such a copy to be.

This witness does not testify that any word given by him was in the original; and while it may be implied that some words, as the name of the court, the venue, and the names of parties were in the paper, there is no testimony, that any series of words given were in the original declaration.

A record may and must be tried by itself. The court must peruse a written document and judge, from the words used, their grammatical arrangement, and their grouping into sentences, etc., what is the effect of the document.

The Standard dictionary says of giving a substantial statement of such a matter: "Giving the correct idea, though not the exact expressions." And Webster defines Substance: "That which underlies all outward manifestations."

It is evident, from the testimony, that the witness only testified to his idea of what the declaration meant (which he had not seen for twenty-six years), given in as nearly similar expressions to those used in the lost instrument as he could now make up.

The judges of this court, with written documents, or pleadings in print before them, and counsel commenting on them, often differ from the counsel as to the substance and legal effect of the writing. And this illustrates that *the matter above written is not the declaration, nor a copy of the declaration*, which in 1871 formed part of the record of a judgment against Forsyth; but is only the *judgment* of the witness as to what its idea was, formed from impressions of the supposed *idea* left in the vague memory of the witness, for scores of years after the tenor and exact words and expressions had passed from his memory.

It may be evidence, to be received for what it is worth, tending in a remote degree, to show what were the contents of the destroyed record, *but it is not the record, nor a copy of the record.*

If the paper was here your Honors could judge what it meant, what its substance was. It is not here, and your Honors cannot judge what it meant nor what its substance was; but only have the judgment of the witness, as he testifies to his judgment from remote and vague impressions of the words and sentences, and a thousand other matters which now influence his impressions.

NOTE 2: In the foregoing (supposed substance of the lost declaration) we have italicized all that was averred, in the case at bar, of statement of fraud, in the confession and avoidance of the discharge in bankruptcy. (Trans., 8-9; Marg. p. 10.) And even in the italicized matter there is a variance.

In the replication (Trans., pp. 8-9; Marg. p. 10) the averment was that the judgment sued on was for damages "claimed by the plaintiff in said action to have been sustained by said plaintiff by reason of alleged fraud practiced by the defendant upon said plaintiff, by which the plaintiff was induced to advance and pay to the defendant a large sum of money, to wit: about the sum of twelve hundred dollars, by the false and fraudulent representations of the defendant, that, he, the defendant, owned and had in his possession, ready for delivery, a large quantity, to wit: six hundred cords of cordwood in Lake County in the State of Indiana."

That is the only averment of fraud in the case at bar. The next line speaks of *said fraud;* and all after that, refers to the fraud *aforesaid,* or uses like words of reference.

The first variance is, that the averment of the fraud in this case is, that the judgment was got on a false representation by defendant that he, defendant, *owned and had in his possession* a large quantity, to wit: *six* hundred cords of wood in Lake County in the State of Indiana.

The evidence of the substance of that declaration is of a representation by defendant that he *had* a large amount, to wit: *two* hundred cords.

Declaration on a representation of defendant that he *had two* hundred cords, would not sustain the averment of this case that the declaration was on a false averment that *he owned and had in his possession, six hundred cords.*

If the judgment of 1871 was on a declaration of which the substance was as witness states it, that told of *birch* wood, where it was cut and piled, that a purchaser had contracted to purchase it, and that Forsyth got the money by representing that if Vehmeyer would advance him five dollars per cord on the two hundred cords, he, Forsyth, would immediately ship the cordwood to Chicago. It then told that Forsyth only shipped forty cords; that he did not have 200 cords to ship to sell to Eldredge, but only had forty cords, which was shipped to Eldredge.

If that constituted fraud, and if the judgment of 1871 was for a debt created by that fraud, the plaintiff did not mention it in his pleadings in this case. He did not set up any of it to avoid the discharge in bankruptcy.

The witness further testified (Trans., 29): There was only one count in the declaration—of that I am certain.

The defendant's plea was not guilty.

There was no other issue in that case.

There are no records of the proceedings now in existence. I saw them burn. (Oct. 9, 1871.)

The verdict was:

"We, the jury, find the defendant guilty, and assess the plaintiff's damages at $833.35."

I think I know what was the record of the judgment of the court that was rendered at the time. I saw the judgment once. From what I there saw, I can *substantially* state what the judgment was:

Henry F. T. Vehmeyer, plaintiff, *vs.* Jacob Forsyth, defendant. Case. This day came on to be heard the motion of defendant to set aside the verdict aforesaid and for a new trial of said cause—was argued by counsel, and the court being fully advised in the premises doth overrule said motion. Therefore it is ordered by the court—(Plaintiff's attorney here broke in with: "Considered.") Therefore it is considered by the court that the plaintiff have and recover from the defendant his said damages $833.35 in form as assessed by the jury aforesaid, together with his costs in this behalf expended, and that he have execution therefor.

On cross-examination the witness testified that he brought this present suit in 1890, a little less than twenty years from the date of the judgment. That Mr. Vehmeyer had for five or six years been drumming at him to begin the suit before he brought it.

Because plaintiff acknowledged that he had not proved what the record was, but had only produced evidence tending to show what it was, he called another witness to prove another circumstance which tended to show to some extent the substance and effect of the burned record.

R. R. Stevens, called by plaintiff, testified (Trans., 33;

Marg. p. 58) that in 1871, in the employ of Chase Brothers & Company he made brief notes from the papers and *memoranda in the minute book of the clerk* of the court (Trans., 40-1), among which he made the minutes shown on page 39 of the printed transcript. These gave the name of the action as "trespass on the case."

Discharge in Bankruptcy Proved.

Defendant, to maintain the issues on his part read in evidence a duly certified copy of the record of his *discharge in bankruptcy* on December 30, 1880. (Trans., 55.)

It is in all respects complete; and established his plea beyond all peradventure; for the discharge authorized by law is proved by the record, against which no evidence could be given. No doubt of the genuineness and correctness of the discharge was suggested; and the plea stood proved.

The case then stood upon the plaintiff's replication of confession and *avoidance*.

The burden of proof was on the plaintiff to avoid the effect of the discharge; and we have referred to the evidence which he presented.

Other Evidence for Defendant.

Marshall Waite, called by defendant (Trans., 72; Marg. p. 133), testified to the making of the abstract books of Shortall & Hoard in 1871—(as R. R. Stevens had testified to the making of those of Chase Brothers & Company)—and he produced the entry of Shortall & Hoard, of this case and judgment, which is shown on page 74 of the transcript, and which agrees with that of Chase Brothers & Company except in the column headed "Action." Chase Brothers & Company (as we saw when considering Mr. Stevens' testimony) gave the "Action" as "*Trespass on the case.*" Shortall & Hoard wrote it down as "*Assumpsit.*"

Jacob Forsyth, the defendant, testified (Trans., 45): I remember the trial of this case in the year 1871. I was present at the trial. I remember for what I was sued in that case. *I know* for what I was sued in that case.

I have that account with Vehmeyer which shows precisely what it was for.

(The account and letters were offered, objected to and excluded; and we will recur to them later. We are now on the matters actually proved.)

There had been a former trial of the case at bar, in January, 1894. (Trans., p. 13.) At that trial it was conceded that it was proper to introduce testimony showing what the evidence was, which was given at the trial in 1871. It was admitted to show what the real subject of the litigation was, notwithstanding the testimony which the witness Frake gave as to the substance and effect of the declaration as originally filed in that case. (Trans., 64-5.) Robert C. Forsyth was a witness at that trial; and, to avoid having to go into a place many miles from the railway station in the mountains of the extreme northwest, the plaintiff stipulated as to what he testified at the trial of 1894, and that it might be read as his deposition at the next trial. (Trans., 58-9, 64.) *It was read on the trial below.* It was objected to, but the objection was not insisted on, and the testimony stands as evidence given in the case, as weighty as if the witness had been upon the stand.

Further, although Mr. Frake, who tried the cause for the plaintiff in 1871, was recalled as a witness in rebuttal, on behalf of the plaintiff (Trans., 77), he did not contradict the evidence which we below recite in the least. *The matters so testified to, by Robert C. Forsyth, were not denied, and stand proved in the record of this case.*

Transcript 59: *Robert C. Forsyth* testified: I am the son of Jacob Forsyth. I was present at the trial of the case of Vehmeyer against my father. (In 1871, before Judge Porter and a jury, p. 61.) I was a witness.

Jacob Forsyth was a witness on that trial. I did not hear his testimony. I was too far away, back in the court (p. 59).

I saw Vehmeyer on the stand, but did not hear what he said. I saw Marshall on the stand. I could not hear what took place on the stand. I was in the court, at the farther end of the room; away off from the witness stand. (p. 62.)

I was the last witness on the stand. (p. 62.)

I testified upon the stand to the amount of the wood being on hand, and the fact that Vehmeyer had declined to take any more; that he told me that he didn't need any more wood. I testified that Vehmeyer had told me that he did not want any more wood. That was before Judge Porter. (p. 61; Marg. 115.)

INSTRUCTIONS TO THE JURY.

I was in the witness chair when I heard the judge discuss the question as to what kind of a judgment should be entered. (p. 64.)

I heard the directions of the judge as to the character of the judgment. When the jury came in from the jury room, I heard the judge and the lawyer for the plaintiff argue about the character of the judgment; the plaintiff wanted the judgment for fraud as well as for the amount of the indebtedness; and the judge would not allow that—as there had not been any fraud proven—as Vehmeyer had declined to take any more wood. He was getting wood at the time and he declined to take any more. I am stating what the judge said. That is what he said. He said there had been no fraud proven. He said Vehmeyer had been getting the wood and had refused to take any more. (p. 60; Marg. 113.)

This took place in the court room, in the Superior Court. I had been the last witness on the stand. When I heard the judge talking, was after the jury came in. The jury were in their seats before him. (p. 62.)

I was in the witness chair. (p. 64.)

The above matter was proved, without question or the slightest contradiction.

S. J. Harmon testified that he was with the attorneys for the defendant at the time of that trial in 1871, and was present at part of the trial. (p. 70.) The case was tried before Judge Porter and a jury. I was back and forwards from the office, and was present at the trial part of the time. He was asked:

"Do you remember whether or not, the jury at any time

after it had gone out, asked the court for further instructions in the case?"

This was objected to, and defendant's counsel was required to state what he offered to show by the witness, and he said:

"I offer to show, by this witness, that after the jury had retired, they came out, and asked the court, as to whether or not they could find there was fraud involved in the case; and that Judge Porter then instructed the jury, that no fraud had been shown in the case; and that it was the duty of the jury simply to determine the amount, if any, which Forsyth owed to Vehmeyer."

The objections were sustained, the evidence excluded, and defendant excepted. (p. 71, Marg. 131-3.)

ATTEMPTS TO PROVE WHAT EVIDENCE WAS GIVEN AT THE TRIAL IN 1871.

John Marshall (p. 68), who was a witness in the trial of 1871, testified, that he remembered some of the evidence given, and defendant offered to prove by him "that he heard Vehmeyer swear on the trial of that case that he, Vehmeyer, had ordered Forsyth not to ship any more of the wood."

On objection this evidence was excluded and exception saved. (p. 69; Marg. 127-28.)

He testified: In 1869 and 1870 I was in the employ of Forsyth as foreman in Indiana. I remember the case of Vehmeyer against Forsyth tried in 1871. I was a witness in that case. I remember some of the evidence given. Objection being made, defendant offered to prove by this witness:

"That in relation to the 200 cords of wood in question he testified that Mr. Forsyth did have that amount of cordwood, and more, for a long time prior to this lawsuit, and that at the time Vehmeyer claims to have wanted it, * * * Vehmeyer instructed this witness at Castello, Indiana, that he should not ship any more wood to him (Vehmeyer) on account of Forsyth; and that this witness was then handling and cutting wood for Forsyth in the woods."

Objections to the evidence were made and the evidence excluded and exceptions saved. (p. 69.)

Jacob Forsyth, being on the stand, was asked:

"Q. You may state, if you recollect, what the testimony of Vehmeyer was as to his cause of action against you in that case?"

Plaintiff objected, the evidence was excluded and defendant excepted. (p. 46; Marg. 87.)

Jacob Forsyth testified (p. 46) as we have seen: I know what I was sued for in that case. I have that account with Vehmeyer, *which shows, precisely,* what it was for.

He was then asked as follows:

Q. From a reference to that account could you, of your own independent recollection, state what Mr. Vehmeyer claimed upon that trial of the case?

Plaintiff objected, and the evidence was excluded.

Q. You may state, if you recollect, what the testimony of Vehmeyer was as to his cause of action against you in that case?

Plaintiff objected and the evidence was excluded.

Q. *Have you a statement in your possession made by Vehmeyer of his account against you, as it stood prior to the trial of the case in 1871?* (p. 7.) A. I have.

Q. Look at this document, which I now hand you, dated Chicago, *May 1st, 1869,* purporting to be a statement of account, made and signed by Henry Vehmeyer, and addressed to J. Forsyth, and state whose signature is attached to that document?

A. That was received by me at the post-office at Cassello, Indiana, through the post-office. (Page 48.) The signature attached to it is the signature of Henry Vehmeyer. It is dated May 1st, 1869; and I received it soon after.

Q. Did you have it in your possession prior to the bringing of the original suit against you?

A. I did.

Q. Had you *any other statement* of account from Mr. Vehmeyer, prior to his bringing the original suit against you?

A. *I had a letter from him which contained a statement of account.*

Q. Is this (paper evidently shown) the last statement of account you received from Vehmeyer prior to his bringing the original suit against you?

A. Yes. That is the last one.

(It is evident that in offering or marking the papers, they were mixed, for the first offered was the earliest in date.)

Page 50. Q. Look at the documents which I now hand you, dated Chicago, April 3d, 1869, addressed to Mr. Jacob Forsyth, and purporting to be signed by Henry Vehmeyer, and state whose signature is attached to it?

A. Henry Vehmeyer's.

It came to me through the post-office about the time it was dated, giving a reasonable time for delivery.

The two papers identified by Forsyth were offered, but were objected to by plaintiff and excluded.

The first (Trans., p. 48) is a letter from plaintiff, Vehmeyer to defendant, Forsyth, bearing date April 3, 1869. It refers to transactions extending over sixteen months, and makes no suggestion that Forsyth had got a dollar from him by fraud. It refers to having sold wood for Forsyth during the previous winter, to Forsyth's having sent him a few cars, and to Forsyth having sent wood to others, but it does not say anything of Eldredge or suggest that Forsyth had not 200 cords of wood.

The second paper (Trans., p. 50) is *a stated account* bearing date May 1, 1869, and *signed by Henry Vehmeyer.*

It begins by charging *grocery bills* from April 15, 1866, to April 1, 1867, amounting to $338.61.

It then adds interest, at the rate of six per cent. per annum, on that amount, to the first day of May, 1869, and the grocery bills and interest to the date of the account May 1, 1869, give a total of $437.52 to May 1, 1869.

The account then returns to a charge of December 5, 1867—

200 cords of wood at $5—Total cash for wood.$ 923.40
Commission or *profit on wood to* have been by February 1, 1869..... 200.00

These two amounts are footed.....$1,123.40
Then a credit to Forsyth is deducted.
By credit 270.00
And a balance is stated.

"Balance .....$ 853.40
To this sum is added interest at the rate of ten per cent. per annum for fifteen months..... 106.67

The computation is right as stated; $106.67 is the interest on $853.40 for fifteen months at the rate of ten per cent. per annum; and as fifteen months prior to May 1, 1869, would have begun February 1, 1868, it shows that the cash charged for was not advanced December 5, 1867, but later; and as the charge is "*total* cash for wood," it appears that it was paid in different sums. Putting the two sets of facts together it shows a claim of payment by Vehmeyer to Forsyth of $923.40 in lesser sums at different times, of which the average dates from which they could draw interest would be February 1, 1868.

The account thus having charged Forsyth:
A balance (of February 1, 1868).....$ 853.40
Interest 15 months (from February 1, 1868, to May 1, 1869), at the rate of ten per cent. per annum 106.67

And footed the sum.....$ 960.07
Added the above amount of grocery bills and interest thereon to May 1, 1869..... 437.52

And gave the sum of.....$1,397.59

As comprising the total amount of grocery bills and interest thereon, money paid, and *profits* which Forsyth must have been charged because of some agreement claimed by Vehmeyer, with interest thereon.

Of this amount charged to Forsyth, there was:
For groceries prior to April, 1867.....$338.61

Profit or commission that Vehmeyer claimed he was to have had in some way..... 200.00
Interest 205.28

A total of $843.89
Which had nothing to do with any advance of money.

Having thus made up the total of his charges against Forsyth, including everything to May 1, 1869 (as above shown).....$1,397.59
Vehmeyer credited Forsyth by Iowa Land, November 1, 1868..... 600.00

And deducted it, *stating the "Balance"*.....$ 797.59

Then as the debtor charge had included interest on everything to May 1, 1869, he credited interest on the Iowa land, six hundred dollars, "from November 1, 1868, to May 1, 1869," six months, at the rate of ten per cent. per annum....$30.00

He also inserted a credit as follows:
December 30, 1868, By one car of wood..... 32.00

(The date in the transcript given for the last item is "Dec. 30, 1869," but as it is included in the account dated in three places May 1, 1869, and to which a letter is attached dated May 4, 1869, and referring to one of May 1, 1869, it is clear that the date of the last item should have been Dec. 30, 1868.)

The two sums of $30 and $32 last mentioned are in the account deducted from the balance first named; and the final balance is in the account *stated* to be $735.59 on the first day of May, 1869.

Beneath this a statement of credit of forty-five cords of wood at $5—$225; and profit on it $45; which amounts are footed at $270; and as it is not deducted here, it would seem to be a statement of the way the $270 was made up which was above deducted from the $1,123.40.

To this *Statement of Account* is attached a letter dated May 4, 1869, signed by the plaintiff Vehmeyer, with two postscripts, each signed with his initials. In the letter he said: "I have made your bill as small as I could. If I had made it smaller, I would not be doing justice to myself."

Before leaving this *statement of account,* and what it shows, it should be observed that the total cash paid Forsyth was paid for wood and was..$923.40 according to this statement of account, and that the wood was to be $5 a cord.
Also that of the credit of $270, there was 45 cords of wood at $5 ..... 225.00 which must have been applied on the amount advanced for wood
Leaving only .....$698.40 of those advances of money.

Next it appears from the account that the grocery bills bore interest at the rate of six per cent. only, and the money advanced bore interest at the rate of ten per cent.; each debt being kept separate; and the interest at these respective rates being separately computed on each, until May 1, 1869; and as the interest on the $600 credited for Iowa land, November 1st, 1868, was computed at the rate of ten per cent. to May 1, 1869, to balance the same rate charged on the money advanced, and not at the rate of six per cent. to balance the rate of six per cent. charged on the grocery bills, this account shows that the $600 was to be applied and was applied on the debt for money advanced; which was a separate debt, and bore interest at the rate of ten per cent.

The commission or profit on the wood was not to have come due till February 1, 1869, so the $600 paid November 1, 1868, did not apply on that.

It was for the interest of the debtor to have the payment applied on the debt bearing the higher rate of interest; it was probably also for his interest to have it applied on the debt for money advanced if he had received money for the wood and had not delivered the wood; it was natural, also, if Vehmeyer had contracted to advance five dollars per cord on wood that he was to have a commission of a dollar a cord for selling, and had advanced some of the money and found he could not receive and handle the wood (from difficulties in his own yard or trouble in switching) that he should have bargained to be let off and to receive the land instead; and finally the paper is to be taken most strongly against him who propounded it; and from all these causes it appears by the writing that the $600 paid

in Iowa land November 1, 1898, was by Forsyth applied (Vehmeyer agreeing in the application) to payment of the debt for money advanced, and reduced the separate debt for that money advanced from $698.40 to $98.40; and that all the balance of the debt shown by that stated account (except that sum of $98.40) was made up of the grocery bills and claims for commissions and interest.

Jacob Forsyth, being still on the stand, he was asked (Trans., 52; Marg. p. 97):

Q. "You may state whether or not at the time the money is alleged to have been paid to you by Mr. Vehmeyer on account of this wood you had 200 or more cords of wood in your possession?

Plaintiff objected and the objection was sustained.

Q. You may state whether or not, Mr. Vehmeyer, in his account against you, upon which suit was brought and judgment recovered, he charged you with the profit which he would have made upon the 200 cords of wood in question?

Plaintiff objected and the evidence was excluded.

(Transcript, p. 52.) The defendant then offered to prove by this witness that at the time of the alleged sale by him to Vehmeyer of the 200 cords of wood in question, he had more than 200 cords of wood in his possession, which he was ready and willing and able to deliver to Mr. Vehmeyer as the latter demanded; and that Mr. Vehmeyer, after a portion of this wood had been delivered, countermanded the order; and requested Mr. Forsyth not to ship any more wood—because it was difficult to get cars, etc., for the shipping of it.

Defendant further offered to prove by this witness that at the time of trial of this suit originally brought by Vehmeyer against this defendant *that Vehmeyer testified* that he had an open account with Mr. Forsyth for groceries; that he had advanced to him certain amounts of money on account of wood; and that he had credited Mr. Forsyth with certain amounts of money paid by him on account; that he had charged Mr. Forsyth with a commission or profit on 200 cords of wood, claimed to have been sold to him: the sum being $200 or $1 per cord; and that after

having made that charge he received from Mr. Forsyth and credited him with the sum of $600, on account; that this was the only cause of action which he, Vehmeyer, had or claimed to have against Forsyth at the time of the trial.

Also that Mr. Forsyth at the time of that trial testified, that he, Vehmeyer, had ordered Forsyth not to ship any more wood, after he, Forsyth, had shipped about 45 cords of wood.

Plaintiff objected and the court sustained the objection and excluded all of the evidence, so offered.

Wherever above in this statement it appears that the court sustained the objection of plaintiff or excluded the evidence offered the defendant then and there duly excepted.

FIRST.

The first point made by plaintiff in error is on the defendant's plea of discharge in bankruptcy, and the third replication of the plaintiff which averred *that there is not any record, of the discharge in bankruptcy,* granted to said defendant, mentioned and set forth in defendant's said third plea, remaining in the said District Court for the District of Indiana, in manner and form as the defendant has above in his third plea alleged.

The discharge was proved by the exemplification of the record (transcript, p. 55); and *the finding of that issue for the plaintiff* (trans., 20; marg. 34) *was and is against the law and the evidence.* (Trans., 82; marg. p. 148, 9th.)

SECOND.

The second and third points are on the second replication of the plaintiff to the defendant's plea of discharge in bankruptcy, and defendant's rejoinder to said replication.

The declaration is on p. 14, marg. p. 22.

The plea referred to is on p. 7, marg. p. 7, second paragraph.

The replication is on pp. 8-9, marg. p. 10 (2).

The rejoinder is on p. 12.

The finding of the issues thereon for the plaintiff is on page 20, marg. p. 34.

And the point made is that—

The finding of the issue on that replication for the plaintiff is contrary to the evidence.

There is no evidence whatever to sustain the matter averred, for avoidance of the discharge in bankruptcy.

The only averment that the debt was "created by fraud" within the meaning of the exception of the bankrupt act is, that the action in which was rendered the judgment declared on was brought "to recover damages claimed by the "plaintiff in said action by reason of alleged fraud prac- "ticed by the defendant upon said plaintiff, by which the "plaintiff was induced to advance and pay to the defendant "a large amount of money, to wit: about the sum of "$1,200, by the false and fraudulent representations of "the defendant that he, the defendant, *owned and had in "his possession* ready for delivery a large quantity, to "wit: *six* hundred cords of cordwood in Lake County in "the State of Indiana."

The next line avers "that the said action and the right to recover therein were founded solely upon *the said fraud* of the defendant."

The only evidence offered to support that averment was the testimony of Frake. He gives what he judges is the substance of a judgment and verdict and a declaration. The verdict and judgment do not support above averment, except so far as they tend to show that the averments of the declaration have passed in rem judicatam. And the only part of the frame which Mr. Frake gives, as like the declaration, which touches or nears this point is the sentence (trans., 27; marg. p. 47): "represented unto the plaintiff that he *had* a large amount of *birch* cordwood, to wit: the sum of two hundred cords, cut and piled up near the Pittsburg and Fort Wayne in the county of Lake and State of Indiana."

In the matter of fraud the amount alleged is of the es-

sence of the inducement to give credit, and must be precisely proved though stated under a videlicet. (1 *Greenleaf Ev.*, Secs. 58, 60.)

A representation that a person had *six* hundred cords of *cordwood* might form an inducement to advance twelve hundred dollars; where a representation that he had *two* hundred cords of *birch* cordwood might be no inducement at all. In a wooded country a court would almost take judicial cognizance, that where ordinary cordwood is beach and maple, and is worth four dollars a cord, birch is the poorest kind of cordwood (worse than basswood) and worth less than two dollars a cord.

Proof that defendant said that he *had* the wood, would not prove that he said that *he owned and had in his possession* the wood.

Proof that he said that he had the wood *cut and piled up near the Pittsburg and Fort Wayne* in Lake County, Indiana, *ready to be shipped to Chicago,* would not prove that he said that he owned and had in his possession *ready for delivery* in Lake County, Indiana, the wood, etc.

Cut and piled up near the Pittsburgh and Fort Wayne, the wood might be ready to be shipped to Chicago, when the swamps should freeze up, so that it could be hauled out, or when the railroad should put in a station where it could be delivered, or when the railroad would accept wood as freight. It might be where that railroad would not or could not receive it. That particular railroad ran at that time through wild and impassable swamps, with no stations for many miles. That is not in the record. But naming the railroad only identifies in a general way where the wood lay, cut and piled in little piles, ready to be hauled out and shipped or piled up and measured to be delivered. The proof of all the particulars (studiously avoiding any assertion that it was ready for delivery) was not equivalent to proving he said it was *ready for delivery* in that county with all that would imply, as to cordwood.

Lastly, proof that he said he had *two* hundred cords of *birch* cordwood was by no means equivalent to proof that he said he owned and had in his possession *six* hundred cords of cordwood, to induce a man, who had twelve hunred dollars, to lend it to him.

And so we say that this averment of the replication, put in as an averment of fraud, has no evidence to sustain it, and the finding of the issue upon this replication was contrary to the evidence.

Tayloe v. *Riggs*, 1 Peters, 591, pp. 600, 601.

THIRD.

Though the Superior Court found the issue on that replication for the plaintiff and found the facts to be as averred in that replication, they were not sufficient to avoid the effect of the discharge in bankruptcy, and the Superior Court erred in giving judgment against the defndant.

The defendant duly excepted to the judgment. (Trans., 83; Marg. p. 149.)

These pleadings are above collated in the statement of facts.

The replication is as follows (Trans., 8), beginning at the foot of the page (We reprint the averment as we printed it under the last point above):

That the action, in which was rendered the judgment declared on, was brought "to recover damages claimed by " the plaintiff in said action, by reason of the alleged " fraud practiced by the defendant upon said plaintiff, by " which the plaintiff was induced to advance and pay to " the defendant a large amount of money, to wit: twelve " hundred dollars, by the false and fraudulent representa- " tions, of the defendant, that he, the defendant, owned " and had in his possession, ready for delivery, a large " quantity, to wit: six hundred cords of cordwood, in " Lake County in the State of Indiana."

The next line shows that the averment of the facts constituting the supposed fraud was ended, for it says: "That " the said action and the right to recover therein were " founded solely upon *the said fraud* of the defendant."

All that might have been true, and yet the wood might not have been worth the cost of chopping; or it might have been chopped in the woods and swamps, where it could not be hauled out except on the ice, and open winters

might have prevented till it had rotted so as to be worthless; or for some other cause it might be worthless.

To what extent the inducement went is not stated. It is not stated that the plaintiff relied on the representations. They might have been an inducement, but a very minor one, without which plaintiff would have made the advance.

Such a general charge of fraud is no charge at all.

Shafer v. *Davis*, 13 Ill., 395.
Newell v. *Bureau Co.*, 37 Ill., 253.
Kirkland v. *Lott*, 2 Scam., 13.
Wisdom v. *Becker*, 52 Ill., 342.

The facts averred in that replication established by the court *finding the issue for the plaintiff* on that replication, are not sufficient to defeat the operation of the discharge, in bankruptcy, to discharge Forsyth from the debt in judgment.

Neal v. *Clark*, 95 U. S., 704, pp. 708-9.
Wolf v. *Stix*, 99 U. S., 1, pp. 7-8.
Hennequin v. *Clews*, 111 U. S., 676, pp. 681-3.
Palmer v. *Hussey*, 119 U. S., 96, pp. 97-8.
Noble v. *Hammond*, 129 U. S., 65, pp. 68-70.
Upshur v. *Briscoe*, 138 U. S., 365, pp. 376-8.

If every fact stated in the replication was proved, it would not overcome the discharge in bankruptcy, because it would not prove that the debt was *created by fraud* within the meaning of the act of congress.

It may be argued for the defendant in error that other facts were proved *in addition to those alleged in the plaintiff's pleading*, which should be considered to support the claim of the plaintiff.

Before looking at such evidence, we will suggest that if evidence was given *going beyond the replication and tending to prove matters not alleged in it*, such evidence cannot be considered because the fact it tended to prove was not in the case. Evidence to the contrary of this irrelevant evidence would have been irrelevant. (*Stringer* v. *Young*, 3 Peters, 320.) Where the facts alleged are not enough to authorize the relief or judgment sought, the pleading is not aided by evidence tending to show matters of fact not alleged, and not in issue.

Walker v. *Ray,* 111 Ill., 315, p. 321.
Crocket v. *Lee,* 7 Wheat., 522, p. 525.
Harrison v. *Nixon,* 9 Pet., 483, p. 503.
Tayloe v. *Riggs,* 1 Pet., 591, p. 598.
Disbrow v. *C. & N. W. Ry. Co.,* 70 Ill., 246.
T. W. & W. Ry. Co. v. *Jones,* 76 Ill., 311.
Very v. *Levy,* 13 How., 345.

In this case the record is, that *the court finds the issues for the plaintiffs.* (Trans., 20; Marg. p. 34.) The court found nothing but the issues. All the rest of the judgment is matter of law; and the court erred in rendering judgment for the plaintiff, where the discharge in bankruptcy was proved by matter of record, and there was nothing in the issues setting up any defense to it.

Substantial defects in a declaration can always be taken advantage of by motion in arrest of judgment or *on error.*

Culver v. *Third N. Bk.,* 64 Ill., 528, p. 532.
Haynes v. *Lucas,* 50 Ill., 436, p. 439.
Wilson v. *Myrick,* 26 Ill., 34.

FOURTH.

If the court can go outside of the issues made by the pleadings in this case; and can consider all matters tending to show fraud in the original debt, though they may not have been averred in this case, in the replication to the plea of discharge in bankruptcy, and should consider that the declaration in the case of 1871, is proved by the testimony of Frake; and that his testimony overcomes all other evidence touching the matter of fraud in the creation of the debt; still, *a declaration in the words testified to by Frake, though sustained by a verdict of guilty, and merged in a judgment, entered in the very words given by Frake, would not avoid the effect of the discharge in bankruptcy; for, given its utmost scope, it does not show that the debt, in judgment, was* CREATED BY FRAUD *within the meaning of the phrase in the bankrupt act, describing the exception to its effect.*

The rule of this court requires that if any opinion has been filed in the court below a copy thereof shall be annexed to and transmitted with the record.

The rule has been complied with in this case. But it is to be remembered that *the opinions of the Appellate and Supreme Courts of Illinois are no part of the record,* in the cases in which they are filed.

Moore v. *Williams,* 132 Ill., 591, p. 593.
Coalfield Co. v. *Peck,* 98 Ill., 139, pp. 144, 145.

The opinion filed below purports to set out the declaration as testified to by Frake, but there is an inaccuracy (the word *sell* is left out in the last part of the averment, and the conclusion, from the word *Wherefore,* as given in the opinion is not at all as Mr. Frake testified to it). We will, therefore, ask your Honors to consider the supposed declaration as found in the record at pages 27-28 (Marg. p. 46-49) or as compiled from the record above in this brief.

It is apparent that the legal effect of the written record (whenever that has been established by evidence) is a question of law (*Flannagan* v. *Pierson,* 42 Tex., 1; 1 *Thompson on Trials,* §§ 1065, 1067, 1071); and that this question of law is a federal question, when it arises upon a *plea* and proof of discharge in bankruptcy, and replication, that the debt was created by fraud, within the meaning of the bankrupt act of the United States.

The cases cited above under the third point sustain this (fourth) point also, namely:

Neal v. *Clark,* 95 U. S., 704, pp. 708-9.
Wolf v. *Stix,* 99 U. S., 1, pp. 7-8.
Hennequin v. *Clews,* 111 U. S., 676, pp. 681-3.
Palmer v. *Hussey,* 119 U. S., 96, pp. 97-8.
Noble v. *Hammond,* 129 U. S., 65, pp. 68-70.
Upshur v. *Briscoe,* 138 U. S., 365, pp. 376-8.

The point is, that, giving the evidence produced by Vehmeyer the utmost scope that it will bear, it did not amount to evidence that the debt of Forsyth was created by fraud, *according to the sense of that expression in the*

bankrupt act; and the courts of Illinois erred in assuming that it did amount to such proof, either as *res adjudicata* or as presumptive evidence.

Evidence that the action was "*trespass on the case,*" does not tend to show that it was for a debt created by fraud.

The action of assumpsit is an action of trespass on the case upon promises. An action for malicious injury to one's clothing, or other property, or for personal injury, or for the burning of grass or crops, or fences or buildings, or stacks, by sparks from a locomotive may be an action of trespass on the case. Those words, *trespass on the case*, do not imply a debt created by fraud, any more than the words, *action at law* would imply that the action is for a debt created by fraud.

The evidence of the contents of the first declaration was, by the testimony of the plaintiff's attorney, who begun the former action as well as this,—testimony given after a neglect *for twenty-six years* (by the party who called him) to restore the burned record under the common law or under Section 2 of Chapter 116 of the Revised Statutes of Illinois of 1874, when in the nature of things, no man could remember that any particular words were or were not in the lost paper. (*Nichol* v. *Miller*, 37 Ill., 387, p. 410; *Marshall* v. *Peck*, 91 Ill., 187, pp. 189, 190.)

Neither the prejudice of the witness in favor of his client, nor the infirmities of memory after so many years of neglect, nor the fact that the law would not allow the witness to study out what was material for him to swear to and write it out in his closet and read such paper as his testimony, or look at such paper while testifying (*1 Greenleaf on Ev., Sec.* 436, 438; *Thompson on Trials, Sec.* 400), could add words which the witness did not speak, nor facts to which he gave no testimony. They could not put words into his mouth which he did not utter, nor supply material testimony which he did not give.

Therefore we must consider the declaration in the words above printed; *in issue by the general issue;* the verdict in words to which he testified:

"We the jury find the defendant guilty and assess the plaintiff's damages at $833.35;"
and the judgment in the words to which he testified:
"Therefore it is considered by the court that the plaintiff have and recover from the said defendants his said damages $833.35, in form as assessed by the jury aforesaid, together with his costs in this behalf expended, and that he have execution therefor."

If that declaration, issue, verdict and judgment, in the words given, without the addition of a syllable, does not prove that the debt was created by fraud, it was not proved.

That it was created by fraud within the meaning of the bankrupt act was an affirmative averment of the replication, it must be *proved,* or the repliant must be held to have failed in his proof.

U. S. R. S., Sec. 5,117. ***No debt created by the fraud or embezzlement of the bankrupt,*** or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt.

Sec. 5,118. No discharge shall release, discharge or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety or otherwise.

Sec. 5,119. A discharge in bankruptcy duly granted shall, subject to the limitations imposed by the two preceding sections, release the bankrupt from all debts, claims, liabilities and demands which were or might have been proved against his estate in bankruptcy. It may be pleaded by a simple averment that on the day of its date such discharge was granted to the bankrupt, setting a full copy of the same forth in its terms as a full and complete bar to all suits brought on any such debts, claims, liabilities or demands. The certificate shall be conclusive evidence in favor of such bankrupt of the fact and regularity of such discharge. (Statute of March 2, 1867, Ch. 176, Sec. 33, 34; 14 U. S. Statutes at large, 532, 533.)

This court has determined that certain principles govern the construction of these sections, and has established the most liberal construction in favor of discharge, and an extremely strict construction of the section of exceptions, and has applied these principles to the facts in a number of cases, often reversing the judgments of the highest state courts.

By application of the maxim *noscitur a sociis* and other rules of construction this court finds that the words "cre-

ated by fraud" in the statute, are to be strictly construed, and allow no collateral latitude whatever; that they include only such frauds as are of the same grade of moral turpitude with embezzlement; and that frauds which involve less turpitude, or are incidental or collateral, so that the debt was not, in fact, created by the fraud itself, constitute no bar to the discharge; and that "such a construction of the statute is consonant with equity and consistent with the object and intention of the congress. * * * A different construction would be inconsistent with the liberal spirit which pervades the entire bankrupt system." (*Neal* v. *Clark*, 95 U. S., 704, pp. 708, 709.)

The judgment of the Supreme Court of Virginia was reversed by this decision.

In *Hennequin* v. *Clews*, 111 U. S., 676, this court reaffirms the above stated principles of *Neal* v. *Clark* (p. 681); and having mentioned the reasons leading to the first adoption of construction favorable to discharge (p. 679), and referred to decisions of state courts which were contrary to these principles (p. 680), and returned to the doctrine of *Neal* v. *Clark*, the court proceeds (p. 682): "The English authorities are more in accord with the decisions in this country which take a different view from our own on this question." The court then states cases where it would hold the debt discharged, of which the English case said: "no doubt this debt was incurred by fraud" (p. 683), and cites numerous English cases of like character. The court then says: "It is evident that the English courts regard many transactions as frauds or breaches of trust under their statutes, which we do not hold to be such under our bankrupt acts." The case then affirms "the liberal construction made in favor of the certificate of discharge in this country," and concludes: "We think that the previous decisions of this court, and of the state courts in the same direction, accord with the true spirit and meaning of the Act of Congress, and with the necessities of our business conditions." (pp. 683-4.)

In this case the judgment of the Court of Appeals of New York was affirmed.

Wolf v. *Stix,* 99 U. S., 1, at page 7, distinguishes that "to come within this exception of the bankrupt act, the debt must be *created* by fraud"; and inasmuch as the whole creation of debt was not by fraud, but the fraud was in an incident, or collateral part, it was held that the debt did not come within the exception. (The judgment of the U. S. Circuit Court was reversed.)

In *Palmer* v. *Hussey,* 119 U. S., 96, at page 98, this court held that "the fraud and trust established by the findings were not of a character to bar the effect of the discharge." * * * *

"It is clear that, under the ruling of this court in *Hennequin* v. *Clews,* 111 U. S., 679, there was no such fraud in the creation of the debt, * * * as to bar the operation of the discharge."

In *Noble* v. *Hammond,* 129 U. S., 65, this court, at pages 68 and 69, considered the principles of decision so enunciated in *Neal* v. *Clark, Wolf* v. *Stix,* and *Hennequin* v. *Clews,* and concluded (p. 70): "The judgment of the Supreme Court of Vermont is in conflict with the *principles* laid down by the decisions of this court, as well as the general drift of those of the several state courts, and is, therefore, reversed."

In *Upshur* v. *Briscoe,* 138 U. S., 365, at pages 376-378, this court reviews the several cases above cited, beginning with the words (p. 376): "The construction by this "court of Section 33 of the bankruptcy Act of 1867 has "been as follows" (then follow references to said cases): The court then cites a Massachusetts case (pp. 377-8), which distinguishes between the creation of the debt by fraud, and the effect of associated, collateral or incidental frauds, which did not create the debt.

The case then proceeds to apply the principle of extremely strict construction, to limit other associated words to the narrowest possible application.

If *trusts* within the meaning of the statute, were by construction limited to such as "implied a fiduciary relation existing previously to, or independently of the transaction from which the excepted debt arose," as strict a construction applies also to *the creation of the debt,* referred to in the statute.

In deciding that the words limiting discharge, are to be very strictly construed, and that they do not embrace debts arising from trusts of the character involved, this court, in *Neal* v. *Clark*, 95 U. S., at page 708, quotes from the opinion of the court delivered by Mr. Justice McLean in *Chapman* v. *Forsyth*, 2 How., 202: "If the act embrace such a debt, it will be difficult to limit its application. It must include all debts arising from agencies, and indeed all cases where the law implies an obligation from the trust reposed in the debtor. * * The cases enumerated—the defalcation of a public officer, executor, administrator, guardian or trustee, are not cases of implied but special trusts, and the other fiduciary capacity mentioned must mean the same class of trusts. The act speaks of technical trusts, and not those implied from the contract. A factor is not therefore within the act." The same language was quoted as furnishing one reason for the decision of *Hennequin* v. *Clews*, 111 U. S., at page 679. Applying parallel reasoning to the matters alleged in the supposed declaration of *Vehmeyer* v. *Forsyth*, on which the judgment was supposed to be obtained in 1871, it appears that if Forsyth was not discharged from that debt, very few borrowers or purchasers on credit could have been discharged. Every lawyer who, about the time of borrowing, boasted a little too much of fees earned, every farmer who said he was about to haul his crop to town and that it was a large one, when he intended to haul only part, every merchant who boasted a little too enthusiastically of his sales, at the time of borrowing or receiving credit, would have created by fraud, the debt incurred.

These cases apply very closely to the case at bar. They hold that the line "no debt created by the fraud or embezzlement" of the bankrupt, by association of words, limits the meaning of the word fraud to such frauds as are of the character of or equal moral turpitude with embezzlement; and that this limitation of meaning by the association extends to bar breaches of all ordinary agencies and mercantile and special trusts, from the operation of the section. If culpability, or violation of strict integrity can be spelled out of said supposed declaration, still there was no such creation of the debt by fraud, as these cases require, to annul the discharge in bankruptcy pleaded by Forsyth.

We will now examine more closely the evidence produced by Vehmeyer, held by the courts of Illinois to prove that the debt of Forsyth was created by fraud, within the intent and meaning of the act of congress.

The first abstract named the case "Assumpsit," the second named it "Trespass on the Case."

Actions are ordinarily begun by præcipe, in which the plaintiff's attorney directs the clerk to issue a summons commanding the defendant to answer unto the plaintiff in a plea of "trespass on the case upon promises" (or any named action) to the damage of the plaintiff of (any sum named.) (*Meservey* v. *Beckwith*, 41 Ill., 452, p. 453; *Durham* v. *Eaton*, 28 Ill., 264, p. 271; *Thompson* v. *Turner*, 22 Ill., 389, p. 390.)

An action of *assumpsit*, so-called, is an action on the case, and *is properly entitled in the declaration an action of trespass on the case.* (*Carter* v. *White*, 32 Ill., 509.)

The precise language of precedents need not be followed, and in assumpsit it is mainly necessary that a consideration shall be expressed and a promise based on that consideration. (*Read* v. *Walker*, 52 Ill., 333.)

All declarations begin with the statement that plaintiff complains of defendant, who has been summoned in a plea of—naming the action thus: trespass on the case—trespass on the case upon promises—assumpsit—or other name. The clerk, who is a ministerial officer, cannot judge from the averments, but takes the name of the action from this naming, or from the præcipe where no narr. is filed. So these abstract clerks take their note from the name given, and the note is not evidence what the declaration contains. If the declaration when filed is variant from the writ, the defendant may waive the variance and plead to the merits, or plead the variance. (*C. & T. C. & R. Co.* v. *Lickiss*, 72 Ill., 521, p. 522; *Meservey* v. *Beckwith*, 41 Ill., 452, p. 454; *1 Chitty Pl.*, 442, 254-5.)

In any event the fact that an action is "trespass on the case" does not tend to prove that fraud is averred in any form. (3 Bl. Com., 158, 159, 122; 2 Chitty's Pleadings, 1-2, "Beginnings and Conclusions of Declarations";

Puterbaugh Common Law Pl., 6th Ed., 882; Same title, 7th Edition, pp. 75-6.)

"Trespass on the case," is, "the form of action at common law, adapted to the recovery of damages for some injury resulting to a party from the wrongful act of another, unaccompanied by direct or immediate force; or which is the indirect or secondary consequence of such act." (*Black's Law Dic.*)

The verdict which is the response to the issue is, in nearly all cases, "guilty" or "not guilty;" and a verdict of guilty does not, in itself, carry any suggestion of fraud. (Puterbaugh Com. Law Pl., 7th Ed., 843.)

The only evidence supposed to show fraud, is the declaration testified to by the witness.

If that is written out in consecutive form, with every hesitation and ambiguity in the testimony resolved in favor of Vehmeyer, the declaration is as follows:

"Henry F. T. Vehmeyer, by Buschel & Frake, his attorneys, plaintiff, complains of Jacob Forsyth, defendant, summoned, etc., in a trespass on the case:

"For that whereas, heretofore, to wit: on the 10th day of August, 1868, in order to induce plaintiff to advance him a large amount of money (to wit: the sum of $1,200), falsely and fraudulently represented unto the plaintiff that he had a large amount of birch cord wood (to wit: 200 cords), cut and piled up near the Pittsburgh and Ft. Wayne, in the County of Lake and State of Indiana, ready to be shipped to Chicago; that one Eldredge had contracted to purchase said wood at $6 per cord in the city of Chicago, when shipped; and that if Vehmeyer, the plaintiff, would advance to him at the rate of $5 per cord for the 200 cords of wood, he the defendant, would immediately ship said cord wood to the city of Chicago; that the plaintiff, Vehmeyer, relying upon these representations being true, advanced to the defendant said sum of $1,000;

"That the defendant shipped only the sum of 40 cords of wood to the said Eldredge, from which he, said Vehmeyer, received the sum of $6 per cord;

"That the representations of the defendant falsely, were false and fraudulent;

"That he did not have, nor never did have, in the county of Lake, and State of Indiana, 200 cords of birch cord wood piled up ready for shipment to the city of Chicago, to *sell* said Eldredge; but only had, neither in the county of Lake, nor anywhere else—but only had the sum of 40 cords of birch cord wood which was shipped by the said defendant to the said Eldredge.

"Wherefore the plaintiff was damaged to the extent of $1,500, and hence he brings this action of fraud and deceit against the defendant."

In view of the construction given by this court to the provisions of the bankrupt law as to discharge of the debtor, it is necessary that the court examine this supposed declaration, to see whether it proves that the debt was *created by fraud* within the meaning of the bankrupt act.

The first averment towards such fraud is that "in order to induce plaintiff to advance him a large amount of money (to wit: $1,500 or $1,200)."

There is no suggestion that plaintiff did advance twelve hundred dollars, but only a less sum.

The substance of the averment is "a large amount of money," the videlicet only limits the amount to the sum named or less, and it might be any sum less than that named. The videlicet is only a parenthetical expression.

The second averment challenges scrutiny.

It begins with the words "falsely and fraudulently represented unto the plaintiff that he had a large amount of birch cordwood (to wit: 200 cords) cut and piled up near the Pittsburgh and Ft. Wayne, in the County of Lake, and State of Indiana, ready to be shipped to Chicago."

That was not a representation that he had 200 cords, but only a representation that he had a large amount, not exceeding 200 cords; and it was literally true if he had forty cords at the place stated, ready as stated. (*Bouvier Law Dic., Videlicet;* 1 *Greenleaf Ev.*, § 60; *Stephen on Pleading*, 318; *Brown* v. *Berry*, 47 Ill., 175, p. 177; *Shepard* v. *Ogden*, 2 Scam., 257, p. 259.)

If an action of assumpsit or trover had been brought laying damages at $1,200, averring that defendant bought or converted to his own use, a large amount (*to wit:* 200 cords), at the price of, or worth, $6 per cord, etc., and general issue had been pleaded, and evidence given that plaintiff sold defendant 40 cords at $6 a cord, or that defended converted to his own use 40 cords (the property of plaintiff), worth $6 a cord, the verdict in either assumpsit or trover would have been an unqualified verdict of *guilty;* and in either action the jury would have assessed the plaintiff's damages at $240. (*Tidd Pr.*, 869, 870.)

The amount under videlicet is satisfied by proof of a less amount. (*Straight* v. *Hanchett*, 23 Ill. App., 584, pp. 588-9; *Shepard* v. *Ogden*, 2 Scam., 257, p. 259.)

The third averment is: "That one Eldredge had contracted to purchase said wood at six dollars per cord, in the city of Chicago, when shipped."

It is noticeable that the witness started to testify that the averment was that *he* had contracted to sell to Eldredge, but he retracted that as wrong, and substituted that Eldredge had contracted to purchase said wood; that is—"a large amount (to wit: 200 cords") when it should be shipped.

It is also noticeable that *no one contracted to ship that or any wood to Eldredge.*

The fourth averment is: "that if the plaintiff would advance to him at the rate of five dollars per cord for the 200 cords of wood, he, the defendant, would immediately ship said cordwood to *Chicago.*"

But it is to be noticed that *there was no suggestion that Vehmeyer should receive the wood, or have anything to do with it, or with any of the proceeds, or that Forsyth should sell it after it should reach Chicago.*

The fifth averment is: "That the plaintiff, Vehmeyer, relying upon the representations being true, advanced to the defendant said sum of $1,000."

It is to be observed that *Vehmeyer took no security upon the wood; that he asked no more right or interest in it or its proceeds than on defendant's clothing; and that defendant did not promise to pay him one penny that he might receive for it.*

The sixth averment is: That Forsyth actually shipped 40 cords of wood to Eldredge, from which Forsyth paid Vehmeyer $240.

(Whether this 40 cords was birch wood or where it was shipped from is not averred.)

The seventh averment is: "That the representations of the defendant falsely were false and fraudulent."

That is not an averment of fraud. What representations were averred to be "falsely" do not appear; but the averment is in effect that only such representations as were falsely made were fraudulent, without specifying any as false, except in the next subsequent averment.

The eighth averment is: "That he did not have, nor never did have, in the County of Lake and State of Indiana, 200 cords of birch cordwood piled up and ready for shipment to the city of Chicago *to sell said Eldredge*, but only had 40 cords of birch wood which was shipped by said defendant to said Eldredge."

The whole sentence is to be taken together. *The words describing what he did not have are words of essential description.*

The second averment had been that he represented to the plaintiff that he had a large amount of birch cordwood, not exceeding 200 cords, cut and piled up, ready to be shipped *to Chicago*. "This eighth averment is that he did not have 200 cords of birch cordwood piled up and ready for shipment *to sell said Eldredge;* but that he did actually ship forty cords to Eldredge. This admits that if he did not have 200 cords, he did have a large amount, not exceeding 200 cords (that is, to wit: 200 cords).

There was no averment that Forsyth had no other property in Illinois, or that this wood should be so placed that Vehmeyer could levy on it if he should get judgment.

The whole averment only amounts to a vague promise that if Vehmeyer would lend him $1,200 he would hurry around and get some goods into a market town, which he said he had in an adjoining county. And that was all.

Vehmeyer lent him $1,000, and did not seek in any way to connect the wood with the loan. He was to have no control of or connection with or security on it. The loan was a simple unsecured loan to Jacob Forsyth, for which he did not even take a promissory note.

If as collateral to that debt he had taken Forsyth's agreement to ship 200 cords of wood to Chicago and sell it, and pay the money over to him, and Forsyth had sold the wood and kept the money, all the above cases show that his discharge in bankruptcy would have been absolute; and this declaration shows nothing like an embezzlement, or fraud, within the meaning of the bankrupt act.

The last clause of the declaration as given in the opinion of the Supreme Court of Illinois is: "Wherefore the plaintiff asks damages to the extent of $1,500, and hence he brings this action of fraud and deceit against the defendant."

Those words "fraud and deceit" are no part of any averment, and have no effect at all, being mere surplusage.

Ayers v. Richards, 12 Ill., 146, p. 148.
Puterbaugh's Pl. Common Law, 6th Ed., 832.
2 Chitty's Pleadings, 1-2, 4.

The clause testified to was:

"Wherefore the plaintiff was damaged to the extent of $1,500, and thence he brings this action of fraud and deceit against the defendant."

Upon that declaration with general issue pleaded, if Vehmeyer had proved that August 10, 1868, he loaned Jacob Forsyth $1,000, and had received $240 from Forsyth, paid thereon, what would have been the Verdict?

Clearly: "We the jury find the defendant guilty; and assess the damages at $——" (naming the amount of money due).

No evidence would have been required to be given upon any of the collateral averments, or upon any averment aside from those of the mere loan of the money.

Lusk v. Cook, Breese, 84.
Burnap v. Wight, 14 Ill., 301, p. 303.
Hiner v. Richter, 51 Ill., 299.
1 Chitty's Pleadings, 232, 233.

If the debt had been created by fraud, it could not have been proved without proving the fraud. As the judgment proved could have been got, on that declaration, without any evidence of fraud, that judgment, read in evidence, is not evidence that the debt was created by fraud.

Wells on Res Adjudicata, Sec. 3, 203, 213, 214, 215, 216, 224, 226, 227.
2 Smith's Leading Cases. Hare & Wallace Notes, 794.
McCall v. Carpenter, 18 How., 297, p. 302.
Washington Packet Co. v. Sickles, 5 Wall., 580, p. 592.

Russell v. Place, 94 U. S., 606, pp. 608-610.
Wood v. Jackson, 8 Wend., 9.
Althrop v. Beckwith, 14 Ill. App., 628, pp. 632, 633, 634.
Mervin v. Lewis, 90 Ill., 505, p. 509.
Riverside Co. v. Townshend, 120 Ill., 9, pp. 17, 18.
Chicago v. Cameron, 120 Ill., 447, p. 459.
Atty. Gen. v. C. & E. R. R. Co., 112 Ill., 520, p. 539.
Umlauf v. Umlauf, 117 Ill., 580, p. 587.
1 Black on Judgments, Sec. 611, 624.

Warner v. *Cronkhite*, 6 Bissell, 453, supports the last above proposition with clear reason and authorities. It was decided in the Eastern District of Wisconsin:

At page 458 the court says: "Now in the case at bar what does the record show? The complaint in the action, in which the judgment sued on was rendered, shows a cause of action springing exclusively from alleged fraudulent representations *in an exchange of property*. It was not an action *upon contract, with immaterial allegations of fraud*, but it was an action grounded *solely upon the fraud*.

* * * *

As the record of the action shows *a material and traversable allegation of fraud as its sole foundation*, the debt or demand may fairly be said to be one of fraud, and the action to be one founded upon a debt or claim from which the bankrupt's discharge would not release him. *In re Whitehouse*, 4 Nat. Bankruptcy Register, 93."

The distinction is apparent, for the action of Vehmeyer against Forsyth in 1871, was upon a contract to repay money loaned, with immaterial allegations intended to give a color of fraud, and discredit the defendant; allegations which were not material or traversable. There is no form of pleading, in which the defendant could have traversed the so-called allegations of fraud, so as to bar the action. If Forsyth should have attempted to traverse the averments of fraud only, the plaintiff would have taken judgment *nil dicit*, on the contract, for the amount due on the loan. (1 Tidd. Pr., 562.)

Pages 458-9 (continuing): "*The distinction must not be ignored* between the question as it presents itself in the case at bar, and as it would be presented in a case where the allegations of fraud in the original action were incidental and immaterial."

"Upon the record it would seem, that, *had there been no fraud, there could have been no claim*, and had there been no fraud, and consequently no claim, there would have been no judgment."

Thus the distinction between that case and the judg-

ment of Vehmeyer v. Forsyth is apparent. The claim in Vehmeyer's declaration on the contract of the borrower, was not at all affected by the supposed fraudulent representations. The declaration would have been as complete without any averment of such representations as it is with them in it, as printed above.

This is further made apparent by the review of certain New York cases:

Pages 459, 460, referring to *Wood* v. *Henry*: "In that case, the defendants, as commission merchants, received certain property for sale from the plaintiff. They sold the property but did not account for the proceeds. These facts were alleged in the complaint, and so it appeared that the defendants acted in a fiduciary character. Judgment was taken by default. * *

A majority (6 to 2) of the court held that the allegations of the fiduciary character of the defendants were not traversable, and that no execution could issue against the person upon the judgment, because the cause of action did not necessarily import liability to arrest, the cause of action and cause of arrest not being identical. In other words, upon trial, proof of the fiduciary relation was not indispensable to recovery. Here is a plain distinction, between that case and this at bar; for here there could have been no recovery without proof of the alleged fraud, for the fraud was the entire basis of the action. It was in short the sole cause of action.

Prouty v. *Swift*, 51 New York, 594, is in character and principle like *Wood* v. *Henry*, while *Roberts* v. *Prosser*, 53 New York, 260, enforces the principle applied in the case at bar as distinguished from the other cases cited."

Page 461: "In the case of *Palmer* v. *Preston*, 45 Vermont, 154, cited by defendants' counsel, the action was upon contract. *Fraudulent representations had been made to procure a certain indorsement*, but the fraud was not the foundation of the judgment."

This Vermont case seems to be like the one supposed in the declaration of Vehmeyer v. Forsyth (of 1871), which alleges that certain supposed fraudulent representations were made by Forsyth to procure the loan of the money, but they were not the creation of the debt, or even necessary to the cause of action or judgment.

The cases so cited and reviewed by the United States Court for Wisconsin (when both Judge Drummond and Judge Davis participated in the preparation of opinions on such general points, for precedents in the circuit) contain some matters peculiarly applicable to the consideration of the evidence in this case, held by the Illinois courts to prove that the debt of Forsyth was created by fraud, which may be cited from the reports themselves.

Whitehouse, petitioner, 4 National Bankruptcy Regis-

ter, 63 (published as a leading case in 29 Federal Cases, 1,032).

LOWELL, J. (with Judge Shipley): "The bankrupt was arrested on an execution issued from the Superior Court. The record of that court, if admissible, shows that the judgment was based upon a verdict rendered in an action for deceit, and was rendered before the bankruptcy.

* * * * *

"The civil action, in which he is arrested, is distinctly and *solely* founded on fraud, and so is within the equity of the exception of section 33.

* * * * *

"We are of opinion that the record of the action * shows *a material and traversable allegation of fraud as its sole foundation.*"

Wood v. *Henry*, 40 N. Y. (1 Hand.), 124: A declaration or complaint alleged that defendants, as commission merchants, received certain property from plaintiffs, for sale; that they sold the property and kept the money. Judgment was taken by default. Executions against the bodies of defendants were issued, which were set aside by the trial court (pp. 124, 125), and that order having been affirmed by the Supreme Court at general term, was removed into the Court of Appeals. In affirming the judgments, the Court of Appeals said:

Page 128: "In the present case it may have been wholly impossible for the defendants to deny that they owed the money claimed by the plaintiff, or that the consideration of the indebtedness was the receipt of moneys arising from the sale of the plaintiff's goods. And yet they may be quite able to show that they were not commission merchants, and that the circumstances under which they acted did not establish any fiduciary relation between them and the plaintiffs, but the relation of debtor and creditor merely. If so, then by no possible answer which the defendants could truthfully interpose could they have prevented judgment for the plaintiff for the amount claimed. Admitting the debt, they could not demand a trial to determine the extrinsic facts, when the jury must necessarily have found a verdict for the recovery of the money. We have no provision for the trial of such collateral questions, and no warrant for a judgment other than that the plaintiffs recover so much money, with costs."

That precisely expresses Forsyth's predicament—summoned on the above supposed declaration of 1871.

In *Prouty* v. *Swift*, 51 N. Y., 594, the opinion is by the only judge who dissented on this point in *Wood* v. *Henry*, and refers to a declaration much like that supposed of Vehmeyer v. Forsyth, of 1871.

Page 601: "The only other question remaining to be considered is raised by the exception to the referee's finding of law, that the defendants acted in a fiduciary character, within the meaning of subdivision 2 of Sec. 179 of the code.

That was not warranted by the issues which he was called upon to try. The character or nature of defendants' employment was not an issuable fact. This I deem to be settled by the decision of *Wood* v. *Henry*, 40 N. Y., 124. It was wholly immaterial to the plaintiff's right of recovery, whether the legal liability, which the defendants had incurred, resulted from a fiduciary relation, or that of debtor and creditor merely, in the ordinary and common acceptation of those terms. The action was, substantially, so far as it related to the demand for the recovery of the money in question, one for money had and received to and for the plaintiff's use; and he would have been entitled to a judgment therefor, notwithstanding a finding by the referee (in case he had so found) that the defendants did not act in a fiduciary capacity."

Roberts v. *Prosser*, 53 N. Y., 260, was decided as follows:

Page 263: "*Wood* v. *Henry*, 40 N. Y., 124, * went upon the ground that a recovery might have been had under the allegations of the complaint without showing any fiduciary relation between the parties. In the action now in question it is very clearly otherwise."

Palmer v. *Preston*, 45 Vermont, 154, goes upon the same distinction. The question decided was that the debtor was discharged by his certificate in bankruptcy.

Page 156: The vital question in the case is whether the debt sought to be collected in this suit was created by fraud. If so, the defendant's discharge in bankruptcy is no bar to the enforcement of its payment by the court.

If the record of the judgment in suit is examined, it will be found that the debt, evidenced by the judgment, was created by the contract which the defendant entered into.

Page 157: "The defendant would not now be allowed to impeach the judgment, by showing *that no such contract, as the record of the judgment discloses*, existed between the testator and himself, or that the indebtedness, evidenced by the judgment, was created by fraud, *and not by contract.*"

Page 158: The court quotes from the case of *Whitehouse*, where it holds, that if the declaration shows a material and traversable allegation of fraud as its *sole foundation*, the debt or demand may fairly be said to be founded on fraud; but proceeds on page 159 to follow the decision of Judge Nelson (of this court), that where the judgment shows that the debt sought to be enforced was *created by contract* (and not by fraud) it imports verity, and the plaintiff cannot afterwards claim that it was created by fraud, even though in his declaration, on which that judgment was obtained, he had alleged any amount of fraudulent statements of the debtor, to induce the creditor to enter into the contract, on which he had obtained his judgment.

These cases lead to the conclusion (as shown in *Prouty* v. *Swift*), that the court, in the trial of 1871, upon the above printed declaration, at issue by any plea that could put it at issue, would have entered judgment for the plaintiff, if the jury had found the following special verdict:

We the jury find that on the 10th day of August, 1868, the plaintiff (Vehmeyer) loaned one thousand dollars to the defendant

(Forsyth), that to induce the plaintiff to advance said money to him, the defendant represented unto the plaintiff that he had a large amount of birch cord wood cut and piled up near the Pittsburgh, Fort Wayne & Chicago Railway, in the county of Lake and State of Indiana, ready to be shipped to Chicago; that one Eldredge had contracted to purchase said wood at six dollars per cord, in the city of Chicago, when it should be shipped into said city; and that if Vehmeyer, the plaintiff, would advance to him five dollars per cord for two hundred cords of said wood, he (defendant) would immediately ship said cord wood to the city of Chicago; that the plaintiff (Vehmeyer) relied that the representations of the defendant were true, and believed that he would do as he agreed; that at the time stated, said Forsyth had more than two hundred cords of birch cord wood, cut, and piled up near said railway, at the place stated, ready to be shipped to Chicago; that one Eldredge had contracted to purchase said wood in the city of Chicago, at six dollars per cord, from time to time, and whenever it should be shipped into said city; that a few days after said loan was made, said Vehmeyer offered to receive said wood in the city of Chicago for said Forsyth, and sell and deliver the same to said Eldredge upon the payment by said Eldredge from time to time of the sum of six dollars per cord therefor, as he had contracted with said Forsyth; that thereupon said Forsyth began shipping said wood to said Vehmeyer in said city of Chicago, and said Vehmeyer so received from said Forsyth and sold to said Eldredge, under said contract 45 cords of said wood for which he received six dollars per cord, amounting to $270; that said Eldredge then being unable to procure cars for transportation of said wood to his lime kilns, refused to purchase or receive any more of said wood; and said Vehmeyer notified said Forsyth, and directed said Forsyth to ship no more of said wood to him, said Vehmeyer. Said Forsyth never shipped any of said wood to said Eldredge. That deducting his charges for receiving and selling said wood, said Vehmeyer has credited to said Forsyth the sum of $166.65 out of said $270 so received.

If upon the foregoing facts the law is with the plaintiff, we find for the plaintiff and assess his damages at $833.35; and if the law is with the defendant we find for the defendant.

Upon that verdict the court would have entered judgment for the plaintiff.

It seems to be demonstrated that the averments of the declaration supposed to show fraud, are immaterial, not traversable, and that the judgment does not tend to show that the debt was created by fraud within the meaning of the bankrupt act.

The law is, that the burden of proof as to the former issue is on the person who sets up the judgment, and *he must make it clear and decisive* (WELLS *on Res Adj.*, Sec. 215); and "*a judgment is* NO EVIDENCE *of matter to be inferred from it by argument.*" WELLS on *Res Adjudicata*, Sec. 216.)

"A judgment is NO EVIDENCE *of a matter which comes collaterally in question merely, nor of matter incidentally cognizable, or to be inferred only by argument, or construction, from the judgment."*

Lawrence v. Hunt, 10 Wend., 80 pp. 83, 84.
Wells on Res Adjudicata, Sec. 200, 201, 202, 224.
Broom's Legal Maxims, 335.
2 Smith's Leading Cases, Hare & Wallace Notes, 793 (*677).

It is apparent that the question at issue and tried in the case of Vehmeyer v. Forsythe in 1871, was not the same question which is at issue in the present suit, upon the averments to overcome the effect of a discharge in bankruptcy in 1880, duly pleaded and proved.

In 1871 there had been no proceedings in bankruptcy, and the question whether the debt had been "created by fraud" according to the true intent and meaning of the bankrupt act should not have arisen.

To make the judgment of 1871 an estoppel and res adjudicata on that point, that point must have been *a vital issue* on the former trial, as said by *Black on Judgments* in Sec. 226. It could not have been an issue at all; and whether that judgment was for tort or on contract is wholly immaterial to the question and issue raised for the first time (for the confession and avoidance of the plea of discharge), by the reply that *the debt alleged was created by fraud within the meaning and intent of the bankrupt act.*

To apply the maxim, *transit in rem judicatam,* it is essential that the question decided in the former action be *the same question* now raised; it must be *the same point.* "The conditions * * are, that *the same identical matter* shall have come in question already in a court of competent jurisdiction, that the matter shall have been controverted, and that it shall have been finally decided." "The judgment * * *directly upon the point,* is * conclusive between the same parties, upon the same matter directly in question in another court, * * (or) coming incidentally in question in another court, for a different purpose. *But neither* the judgment of a concur-

rent or exclusive jurisdiction *is evidence of any matter which came collaterally in question * * nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.*

BROOM'S LEGAL MAXIMS, 328, 331, 334, 335.

It is not necessary to the conclusiveness of the former judgment, that issue should have been taken upon the precise point which is controverted in the second trial; it is sufficient, if that point was *essential to the finding of the former verdict."* (1 GREENLEAF ON EV., Sec., 534.)

That the debt of Forsythe was created by fraud within the intent and meaning of the bankrupt act, was not a point *essential* to the finding of the former verdict. Even the point that there was any fraud at all in obtaining the credit by Forsyth was not a point *essential* to the finding of the former verdict; that point could only be inferred by argument from the declaration and judgment; it was only incidentally cognizable by the jury because it was suggested in the declaration, but as it was not essential to the finding of the verdict which the jury found, nor to the judgment which was entered, it only came collaterally in question.

Let us return to a more comprehensive analysis of this declaration, which will further demonstrate that *there was no fraud, in the creation of the debt, alleged in that declaration.* The declaration is that—

"To induce plaintiff (Vehmeyer) to advance him (Forsyth) a large sum of money (to wit: the sum of twelve hundred dollars)—falsely and fraudulently represented unto the plaintiff, that he had a large amount of birchwood (to wit: two hundred cords) cut and piled up near the Pittsburgh and Ft. Wayne in the County of Lake and State of Indiana, *ready to be shipped to Chicago;* that one Eldredge had contracted to purchase said wood at six dollars per cord in the city of Chicago when shipped; and that if Vehmeyer, the plaintiff, would advance to him at the rate of five dollars per cord, for the two hundred cords of wood, he, the defendant, would immediately ship said cordwood *to the city of Chicago."*

"That the plaintiff, Vehmeyer, relying upon the representation being true advanced, to the defendant, said sum of one thousand dollars."

There is no averment that the defendant did not have a large amount of birchwood cut and piled up as stated ready to be shipped to Chicago. There is no averment that he did not have two hundred cords so ready to be shipped *to Chicago.*

There is no averment that Eldredge had not contracted *to purchase* said wood, at six dollars per cord, *in Chicago,* when shipped.

There is no averment that Forsyth did not immediately ship said cordwood *to the city of Chicago.*

NOTE: The purchase by Eldredge was to be *in Chicago;* the wood was to be shipped to Forsyth himself or to some agent for him; and if Eldredge should purchase, as he had contracted to do, he would pay cash on delivery of the wood. Eldredge was neither to pay for the wood before its delivery; nor was Forsyth to allow the carrier to deliver the wood to Eldredge without payment of the price of the wood.

The only averment having the form of a traverse of the alleged representations, lacks the substance, it is as follows:

"That the representations of the defendant falsely were false and fraudulent; that he did not have, nor never did have, in the County of Lake and State of Indiana *two hundred* cords of birch cordwood, piled up, and ready for shipment to the City of Chicago, *to sell said Eldredge;* but only had forty cords of birch cordwood which was shipped by the said defendant, *to said Eldredge.*"

NOTE: That averment was true if he had an hundred and ninety-nine cords; or if he had two hundred cords, and it was not all piled up; or if he had it piled up for shipment to Chicago to sell to any one but Eldredge. That averment was true if forty cords were delivered to Eldredge, and he refused to take any more.

The qualifying words, are specific words, they limit the general words; they are necessarily to be considered to determine what was averred; and those words being considered, the averment does not traverse the truth of the statements Forsyth is alleged to have made to induce the

loan of the money. (*Bally* v. *Kenrick*, 13 Price, 291; *Tipping* v. *Clark*, 2 Hare, 383, 390; *King* v. *Ray*, 11 Paige, 235, 239; *Davis* v. *Mapes*, 2 Paige, 105, 106.)

In an answer in chancery, to an interrogatory in the bill, a negative pregnant, will only evade the question: an answer which adds *a qualification* to the matter alleged or traversed evades the allegation and is impertinent (*Ibidem*, *Cooper's Equity*, 313; *Mitford's Eq.*, 250; *1 Daniels Ch. Pr.*, 4th Ed., 725 and note), and certainly where it is alleged that certain representations were made to induce a person to lend money, the declaration must traverse the truth of those identical representations, must state that the plaintiff relied on the truth of the representations, must state what of those representations were untrue, and cannot shift the ground, evading the truth of those representations, and substitute either a pregnant denial, which admits the truth of the general statement, or an averment that a different or qualified matter did not exist.

NOTE: That the averment, with the qualifying words, did not traverse the truth of the representations alleged to have been made by Forsyth (in that declaration of 1871) is illustrated by testimony actually given, and by testimony offered in the trial court in this case and contained in this record:

Robert C. Forsyth testified that he heard the instructions given to the jury (in the 1871 trial). That he heard the judge say that there had been no fraud proven, that Vehmeyer was receiving the wood, and declined to receive any more.

John Marshall testified that he was a witness on the trial of 1871, and remembered some of his testimony. Forsyth's attorney then offered to prove by him that he testified that Forsyth had more than the two hundred cords of wood at the time Vehmeyer claimed that he wanted it; that Vehmeyer was then handling and cutting wood for Forsyth at Cassello, Indiana; and that Vehmeyer instructed the witness not to ship any more wood to him on account of Forsyth. Also that he heard Vehmeyer testify at that trial, that he (Vehmeyer) had ordered Forsyth not to ship any more of the wood. (The court excluded this evidence.)

Jacob Forsyth being on the stand was asked, whether or not at the time the money is alleged to have been paid to him by Vehmeyer on account of this wood, he had 200 cords and more in his possession. This was coupled with an offer to prove by him that at that time he had more than the 200 cords of wood there, which he was ready and willing to deliver to Vehmeyer; and that after about forty-five cords of this wood had been shipped he ordered Forsyth not to ship any more, because he (Vehmeyer) could not get cars to reship it, etc.

Non constat but the declaration of 1871 was drawn with its peculiar wording, because Vehmeyer could not deny that every representation made by Forsyth when he borrowed the money was true; and that seems very probable in view of the above testimony given, and that offered with the witnesses upon the stand to answer the questions asked, and excluded.

FIFTH.

..The courts of Illinois erred in excluding the evidence offered by Forsyth tending to show that the judgment of 1871 was upon the debt only; and that it did not embrace any question whether that debt was created by fraud within the meaning and intent of the provision of the bankrupt law of the United States.

Russel v. Place, 94 U. S., 606, p. 608.
Packet Co. v. Sickles, 5 Wal., 580, p. 592.
Wells on Res Adjudicata; Secs. 200, 201, 215, 216, 297, 302.
Lawrence v. Hunt, 10 Wend., 80, p. 84.
Wood v. Jackson, 8 Wend., 9, p. 36.
2 Black on Judgments, Sec. 624.

"Whenever a judgment in a former action is relied upon as conclusive of a particular point or question, it may be shown by extrinsic evidence not inconsistent with the record, that such point or question was not adjudicated in that action, if in law the judgment could have been rendered on any other ground."

2 Black on Judgments, Sec. 628.
1 Greenleaf on Ev., Sec. 532.

"Though the declaration in the former suit may be broad enough to include the subject-matter of the second action, yet, if upon the whole record it remains doubtful whether *the same* subject-matter was actually passed upon, it seems that parol evidence may be received to show the truth. So, also, if the pleadings present several distinct propositions, and the evidence may be referred to either or to all, with the same propriety, the judgment is not conclusive, but only *prima facie*, upon any one of the propositions, and evidence *aliunde* is admissible to rebut it. (*1 Greenleaf on Ev.*, Sec. 532.)

Defendant offered competent evidence tending to show that plaintiff, Vehmeyer, did not make any claim of fraud on the trial in 1871, and that such point or question was not adjudicated at that trial; and that Vehmeyer, himself, testified that Forsyth had the wood, and shipped part of it, and he, Vehmeyer, stopped him from shipping more.

These offers assumed a variety of forms, to which we will refer after citing the court to some authorities which show the competency and relevancy of the evidence excluded.

It also appears that the defendant, Forsyth, offered to prove by competent evidence that the court instructed the jury that no fraud had been shown in the case, and that it was the duty of the jury, simply to determine the amount, if any, which Forsyth owed to Vehmeyer.

Exclusion of the evidence was error.

Wells on Res Adjudicata; Sec. 200, 201, 215, 216, 297, 302.
Lawrence v. Hunt, 10 Wend., 80, p. 84.
Wood v. Jackson, 8 Wend., 9, p. 36.
2 Black on Judgments, Sec. 624.
1 Greenleaf on Ev., Sec. 532.

"Whenever a judgment in a former action is relied upon as conclusive of a particular point or question, it may be shown by extrinsic evidence, not inconsistent with the record, that such point or question was not adjudicated in that action, if in law the judgment could have been rendered on any other ground."

2 Black on Judgments, Sec. 628.

"Though the declaration in the former suit may be broad enough to include the subject-matter of the second action, yet, if upon the whole record it remains *doubtful whether the same subject-matter was actually passed upon,* it seems that parol evidence may be received to show the truth."

1 Greenleaf on Evidence, Sec. 532.

Greenleaf divides the section here, and proceeds: "So, also, if the pleadings present distinct propositions," showing that the clause above quoted applied to where the propositions are not distinct, and judgment may be given on proof of part of the averment, as in the instance at bar where it could be given on proof of the loan, without any evidence of any fraud to induce the loan.

The courts of Illinois erred in excluding testimony as to what evidence was given on the trial in 1871.

In *Hitchin* v. *Campbell,* 2 W. Bl., 827, at page 831, the court says:

"But the principal consideration is, whether it be precisely the same cause of action in both, appearing by proper averments in a plea; or by proper facts stated in a special verdict, or a special case. One great criterion of this identity is that the same evidence will sustain both the actions. Putt v. Royston, 2 Shaw, 211; Payne, 472; 3 Mod., 1; Polfexen, 634; Mortimer v. Wingate, Moore, 463; Bro., Action on the case, 97, 105. These relate to the whole of the demand; but the same reasoning extends to a part of it only; as 4 Co., 92 b, Slade's case."

"Lord Eldon, Ch. J., said that this was the true test. Martin v. Kennedy, 2 Bos. & P., 71."

Wells on Res Adjudicata, Sec. 201, 203.

Washington Packet Co. v. *Sickles,* 5 Wallace, 580, where it cites

Wood v. *Jackson,* 8 Wend., 36, etc.

The instructions of the court, by which the case was submitted to the jury were competent evidence of what was substituted for their judgment. The jury were bound to follow such instructions. The court, in sending

them out to deliberate, may have instructed them: "There is no evidence tending to show any fraud, and you have nothing to do with any claim of fraud; all you have to decide is whether Vehmeyer lent Forsyth money, and if so how much, and to deduct $240 for wood that Vehmeyer admits he has received from Forsyth.

If you find that Vehmeyer did not lend Forsyth any money, the form of your verdict will be: 'We, the jury, find the defendant not guilty.'

If you find that Vehmeyer did lend Forsyth money, the form of your verdict will be: 'We the jury find the defendant guilty, and assess the plaintiff's damages at $——;' naming the amount you find due."

If the court so instructed the jury on the case, that shows the precise matter adjudged by the jury. *It is the province of the court* to determine what are the actual issues,—on what questions there is any evidence, and to limit their consideration to those matters.

The opinion of the court (by Marshall, C. J.) in *Tayloe* v. *Riggs*, 1 Peters, 591, contains matters closely applicable to the case, and to the point before us:

Page 598. "Secondary evidence having been properly admitted * the next inquiry is into its competency to establish the contract stated in the declaration."

* * * * *

"Does the testimony offered by the plaintiff in the Circuit Court prove this contract?"

After stating the testimony of the witness as to the contents of the lost paper, the court speaks of subsequent statements (Page 599): "This part of the testimony shows, that, what the witness had previously said was founded on his recollection of the conversation between the parties which formed the verbal agreement, not on his recollection of the writing itself."

* * * * *

Page 600. *"When a written contract is to be proved, not by itself, but by parol testimony, no vague, uncertain recollection, concerning its stipulations, ought to supply the place of the written instrument.* The substance of the agreement ought to be proved satisfactorily. And, if that cannot be done, the party is in the condition of every other

suitor in court, who makes a claim which he cannot support. When parties reduce their contract to writing, *the obligations and rights of each are described and limited by the instrument itself.* The safety which is expected from them, would be much impaired if they could be established upon uncertain and vague impressions."

* * * * *

"Upon the most attentive comparison we can make of the testimony given by the witness with the contract stated in the declaration, we think that the evidence does not support the contract as laid, and was therefore not competent to support the first count.

* * * * *

"The testimony does not show a contract which supports the second count."

If the supposed judgment is to prove that the indebtedness was *created by fraud* so that the discharge in bankruptcy is no bar, the question to be decided from the evidence in this case is: Was there a judgment of the Superior Court of Cook County, Illinois, entered on or about the 29th day of July, A. D. 1871, which *proved* that the debt was *created by fraud*, and was of that character which the law excepted from the operation of the discharge?

When upon the trial Forsyth had testified that he knew what he was sued for. "I have that account with Vehmeyer, which shows precisely what it was for." "I have in my possession a statement made by Vehmeyer of his account against me as it stood prior to the trial of the case in 1871," counsel for plaintiff, Vehmeyer, objected, that whether it was signed by Vehmeyer, and addressed to Forsyth was immaterial. He said he did not care to look at the paper. "I do not care to go *into the trial* of this original suit any more; *it is res judicata.*" The court said: "I sustain the objection;" and to that ruling of the court the defendant then and there duly excepted. (Trans., 45-47; Marg. p. 89.)

Afterwards defendant was allowed to prove that the documents were signed by Vehmeyer and given by him—

for the purpose of fully describing and identifying them.

But the court excluded all the evidence as to what took place at that trial, and as to the claim on which the suit was brought.

And apparently it was because it had been objected that *the evidence was immaterial because the matter was res judicata:* that is that *the defendant was estopped, by the evidence tending to show the judgment, from giving evidence tending to show what the judgment was for.*

The opinion of the Appellate Court, adopted by the Supreme Court of Illinois, shows that those courts, both, took the same superficial view.

The law is as old as the maxim:

"Non potest adduci exceptio ejusdem rei cujus petitur dissolutis."

"A matter the validity of which is at issue in legal proceedings cannot be set up as a bar thereto." (*Broom's Legal Maxims,* 166.)

All three of the courts of Illinois assumed that there was a *record of judgment* proved as res adjudicata, entered July 29, A. D. 1871, because a witness testified that all the files and the record in the case had been destroyed by fire in 1871, *twenty-six years before he testified,* and he had not read a line of them or any copy of even a line of them, for twenty-six years, and could not state the contents of the declaration, but only the substance (Trans., 24; Marg. p. 42); and because in answer to the question, "Go on and state your best recollection of what that declaration contained; give as near as you can the contents of that declaration?"—he had given his impression (after twenty-seven years) of the substance (not the words) of a declaration which he said that he drew and filed on the 21st day of July, 1870.

Counsel for the plaintiff had his witness testify to the burning of the papers and record, and then asked him:

"Q. Is it possible to produce an original declaration?" He answered: "It is not."

"Q. *Nor any copy of it?* A. It is not."

"Q. Did you preserve any copy made at the time? A. I did not." (Trans., 25; Marg. p. 44.)

The counsel had his witness testify in effect that he did not remember the contents of the declaration, but remembered only the substance. (Trans., 24; Marg. 42.)

All this was necessary, because:

If it was possible to produce an original declaration, that was the best evidence.

If no original could be produced, a copy would be the next best evidence of the contents of the paper.

And evidence of the words, the actual contents of the paper would be better evidence than the testimony of a witness who could not tell what the contents of the paper were, because of lapse of time or lapse of memory, but could only give the impression left on his memory as to what was its substance and idea.

Each kind of evidence was weaker and more remote than that preceding; and he gave *the weakest kind of evidence* of which his case was capable.

Surely his weak impression did not amount to res adjudicata.

Again: His impression was of a paper which he says he drew and filed on or before July 21, 1870. That may have *tended to prove* what the issues were on which the case was tried in May, 1871; and on which judgment was entered July 29, 1871; but that declaration may have been changed before or during the trial—amendments are very liberally allowed; or the party or his counsel may, in open court, have waived the allegation of fraud—may have disclaimed all claim of fraud—and have proceeded for the debt. If the defendant had not objected, or if the declaration had averred that Forsyth promised to pay the money (only three words) the judgment would have been sustained by the declaration (though there was no evidence of the supposed fraud); and would not have been erroneous.

Of course, the witness may have been wholly mistaken in his impression. He may have talked with Vehmeyer, and got an impression from those preliminary talks that the claim was for a deceitful or fraudulent borrowing. (His testimony, stricken out on objection, shows that he had such talks.) (Trans., 24; Marg. p. 41-2.)

That is stricken out, but it furnishes a vivid picture of

preliminary conversations which might have been had, and of which the impression was left on his memory as to the substance of the claim. The impression of a scandalous charge, the discussion of particulars of outrageous wrong suffered by a client, in his anger or malice, told to, and believed by his attorney, would make a far deeper impression on the memory of the lawyer, than the ordinary humdrum details of a declaration in assumpsit, or a special count in case, alleging no fraud.

This is on the subject of memory, and an illustration is found in one of the cases cited. This court said:

"This part of the testimony shows, that what the witness had previously said (as to the substance of the writing) was founded on his recollection of the conversation between the parties which formed the verbal agreement, not on his recollection of the writing itself." (*Tayloe* v. *Riggs,* 1 Peters, p. 599.)

Besides, the Supreme Court of Illinois have recognized as common knowledge that after twenty years *no man could remember that any particular words were or were not in the lost paper.* (*Nichol* v. *Miller,* 37 Ill., 387, p. 410; *Marshall* v. *Peck,* 91 Ill., 187, pp. 189, 190.)

Certainly, when plaintiff had given nothing but such uncertain evidence, tending so weakly to show the contents of the lost record, the trial court was very far from having a judgment so proved, as to estop the defendant from giving evidence tending to show that the judgment was anything else than such as the witness supposed.

The witness may have got his impression from some other man's case, or from some extraneous cause that could not be traced.

Ordinarily the law recognizes that a witness may be mistaken in his view originally, or in his impression or memory, or he may deliberately testify to that which is false.

The memory and impression may be shown (if evidence is permitted) to be so inconsistent with proved and certain facts, that it cannot be believed.

When the party has stood by for twenty-six years, when he could have perpetuated the evidence, or could have restored the record under the common law or under Sec. 2

of Ch. 116 of the Revised Statutes of Illinois (passed in March, 1872), until there is only the weakest and most uncertain of evidence to sustain his claim, shall he now profit by his delay, by having his shadowy evidence erected into a *record,* when no one lives, or has for more than twenty years lived, who could testify that he *read the declaration* on which the trial was had knew its contents, and that it did or did not contain any particular words?

Rather will he be held to be "in the condition of every other suitor in court who makes a claim which he cannot support." (*Tayloe* v. *Riggs,* 1 Peters, p. 600.)

The courts of Illinois overlooked the fact that *when the defendant began to put in his evidence nothing had been established;* only a *prima facie* case had been made that *the records had been destroyed* and parol and other secondary evidence of their contents made admissible; and a little very weak and imperfect evidence had been given which was supposed to *tend* to show that some *particular words and averments* were in the lost record, from which it might be inferred that the debt in judgment was created by the fraud of the defendant.

The constitution of Illinois providing that the subject of an act of the legislature shall be expressed in the title, an act was passed and took effect in March, after the great fire, entitled, "An Act to provide for the restoration of court records which have been lost or destroyed." It was declaratory of the common law. The courts of Illinois have, in the case at bar, decided that such records may be proved after a great length of time, though they have not been restored, while memories were accessible, to aid in making the new record a truthful showing of the destroyed record. Early in April (after the fire) another act was passed and took effect, entitled, "*An Act to remedy the evils consequent upon the destruction of any public records by fire or otherwise.*" Section 23 relaxed the rules of evidence. "In all cases under the provisions of this act, and in all proceedings or actions now or hereafter instituted as to any estate, interest or right in, or any lien or incumbrances upon any land, when any party * * or his

agent or attorney shall * * testify * * that the original of any deeds, conveyances, or other written or record evidence has been lost or destroyed * * *the court shall receive all such evidence as may have a bearing on the case, to establish the execution or contents of the deeds, conveyances, records or other written evidence, so lost or destroyed.*" (R. S. of 1874, Chapter 116.)

The title of the act limited the effect of the act to public records, and to the case of destruction *of public records;* and the act could include nothing else.

It would seem that the evil which the act was designed to remedy was as great where destroyed records of judgments are involved that do not directly affect an interest in land, as those that do. The judgment sued on may be made a lien and enforced by sale of land, and the effect on title is as great in the one case as the other.

One evil designed to be remedied was the difficulty in ascertaining the exact terms and effect of judgment records, which had been destroyed by fire or otherwise, and nearly all cases in which the remedy would be required were named, one condition seems to have been inadvertently omitted.

It was a remedial statute, and to be liberally construed to advance the remedy, and, under many authorities it would be held to relax the rules of evidence, in order that the truth of the matter may be attained in all cases, where the end is to reach the exact truth as to the contents and legal effect of the *judgment,* or other public record, which has been destroyed by fire or calamity. (*Endlich on Statutes,* Sec., 295; *Sutherland on Statutes,* Sec., 409, 413 and note 2.)

"If they be in like reason, they are in like law." (Co. Litt. 191 a.) In consimili casu, consimile debet esse remedium. Qui haeret in litera haeret in cortice. (Brooms Legal Maxims, 685-687; *Castner* v. *Walrod,* 83 Ill., 171, pp. 178-9.)

It is not important to this case that the construction suggested be put upon the act quoted. We have cited it to show how such things are proved in most cases in Illinois, but we stand on this ground:

Wherever a condition is established in which remote, parol and secondary evidence is admissible to ascertain the

contents and effect of a record destroyed by calamity, and one party has resorted to such evidence TO ESTABLISH *his version of the lost record, the other party may give remote, parol and secondary evidence to establish his view, or to get at the truth of the matter.*

"*There are no degrees in secondary evidence;* and " therefore when the absence of primary evidence is ex- " plained satisfactory, any species of admissible secondary " evidence may be substituted for the original.

Powell on Ev., 302 (Ch. V.).
Best on Ev., Sec. 483 p. 613.

Powell says farther: "The rule is, that no evidence is to be adduced which ex natura rei supposes still greater evidence behind, *in the party's own power and possession.*" (*Powell on Ev.*, Ch. V. p. 302.) And this is the effect of the note to section 84, of 1 *Greenleaf on Evidence*, where he says, that "if from the nature of the case itself, it is manifest that a more satisfactory kind of secondary evidence exists the party will be required to produce it."

Near the beginning of the same note, in marshalling the evidence to prove a lost paper or deed, the author gives, first a counterpart, second a copy, third an abstract, etc.; "and *last of all* the memory of a witness." All kinds of matters adapted to the condition of the subject may come under the third division of an "abstract and so forth," but *last of all*, and more uncertain than any other evidence that can be given, is the memory of a witness. Some of the reasons why this is last of all, appear in later sections. Section 88 shows that oral evidence cannot be substituted for any writing, the existence of which is disputed, and which is material either to the issue between the parties, or to the credit of witnesses; for the court acquires a knowledge of the whole contents of the instrument, *which may have a different effect from the statement of a part.* Lord TENTERDEN said: "My experience has taught me *the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of written instruments, they may be so easily mistaken.*"

In section 96 the author says: "Very great weight ought not to be attached to evidence of what a party has been supposed to have said; as it frequently happens not only that the witness has misunderstood what the party said, but that, by *unintentionally altering a few of the expressions really used, he gives effect to the statement, completely at variance with what the party actually did say.*"

This is repeated in Sec. 200, and the author adds: "In a somewhat extended experience of jury trials, we have been compelled to the conclusion that the most unreliable of all evidence is that of the oral admissions of a party.

* * * * *

"It is not uncommon for different witnesses of the same conversation to give precisely opposite accounts of it.

* * * * *

"When we reflect upon the inaccuracy of many witnesses in their original comprehension, their extreme liability to mingle subsequent facts and occurrences with the original transactions; and *the impossibility of recollecting the precise terms used * or of translating them by exact equivalents,* we must conclude there is no substantial reliance upon this class of testimony.

The particular application of these words was to proof of words and sentences heard, or of the substance and effect of words and sentences translated from impressions on the memory.

And they illustrate the fact that *the plaintiff* in our case *did not have or prove a record*, but he tendered the most uncertain kind of evidence of words and sentences, by proving not a copy, nor a copy of a copy, but more remote —the words being forgotten by the witness, he gave *a supposed equivalent,* by a translation of the impression left by the forgotten words upon his memory, or an impression left by something else which he supposed to be an impression left by the forgotten words.

The instances illustrating the utter unreliability of such evidence, which Greanleaf cites, are instances of testimony given within a reasonable time, after hearing the words or reading the written instrument, the impressions of which the witness attempts to translate into new words.

In the case at bar the translation was attempted twenty-six or twenty-seven years after the forgotten words and sentences had been last seen.

The firm was Buschnell & Frake. Ordinary observation of like cases tells us that if Mr. Buschnell could have testified he would have said: "Mr. Frake is wholly mistaken. He was then a young man of little experience, and took all his client said as true, and he thought he had a case of fraud. He is one of the men who always thinks his adversary is a very bad man. He drew a declaration and thought he had fraud alleged in it; but it was very doubtful to me whether it would stand, so I substituted a plain declaration in assumpsit, and tried the case on that."

Whatever were the facts, instead of a record—a matter of res adjudicata—that the debt in judgment was *created* by fraud within the meaning of the bankrupt act, the plaintiff rested, after having given, by a single interested witness, the most remote—worse than a copy of a copy, being only a translation of an impression of forgotten words and phrases—the most remote of parol and secondary evidence admissible in case of a lost record.

We say a single witness, because the abstracter which they produced could not remember a word of the paper, or its contents, and had written "trespass on the case" as the kind of action. He could not tell from his entry or his memory whether it was a personal injury case, or an action against a bailee of some kind, or a carrier, or what the action was for.

The other abstracter put the action down as assumpsit, and that is why we thought Mr. Buschnell had withdrawn the first declaration and filed another in assumpsit, or amended the first by striking out a few words and interlining a few so as to make it a pure assumpsit.

Defendant's evidence (as stated above in the opening of this brief) established that he knew what he was sued for; that he had the written account from Vehmeyer, which showed precisely what it was for.

Robert C. Forsyth testified that in the trial of 1871 he testified to the fact that Vehmeyer had told him he did not want any more wood.

He was the last witness. He testified that he was in the witness chair, and the jury returned, and took their

seats; there was argument by plaintiff's attorney; and the judge instructed the jury that there was no fraud proven; that Vehmeyer had been getting the wood and had refused to get any more.

Defendant attempted to prove by Harmon (a law clerk at the time of the trial) that after the jury had retired they returned and asked further instruction and that the court instructed them that no fraud had been shown in the case; and that it was their duty simply to determine the amount, if any, which Forsyth owed to Vehmeyer.

The court excluded the evidence.

If that instruction was given, it was strong, and in collateral proceedings, conclusive evidence that the pleadings and the issue *at the time* warranted the instruction.

"Omnia praesumunter rite et solemniter esse acta. * * *

"The following may be mentioned as general presumptions of law illustrating this maxim: * * *

"That the records of a court of justice have been correctly made; * * * that judges and jurors do nothing carelessly; *that the decisions of a court of competent jurisdiction are well founded and their judgments regular;* and that facts without proof of which the verdict could not have been found were proved at the trial."

Prima facia the instruction of the court so given was free from error.

Brown's Legal Maxims, pp. 945, 946.

Conclusive presumption it is, that if the record was such that the court gave or could have given that instruction, the debt established by the verdict and judgment was not *created by the fraud of the defendant.*

That the judge gave that instruction to the jury *in the presence* of the pleadings and of the parties and counsel, is better evidence that there was a proper declaration to support it than the translation of Mr. Frake's impression of the effect of the forgotten words and sentences given twenty-six years or more after he had seen a word of them.

Defendant offered to prove by John Marshall that on the trial in 1871, Vehmeyer testified that he had ordered Forsyth not to ship any more of the wood. He offered to prove by Jacob Forsyth that at that trial Vehmeyer testified that he had an open account with Mr. Forsyth for groceries; that he had advanced to him certain amounts of money on account of wood; and that he had credited Mr. Forsyth with certain amounts of money paid him on account; that he had charged Mr. Forsyth with a commission or profit on 200 cords of wood claimed to have been sold to him, the sum being $200, or $1 per cord; and that after having made that charge he received from Mr. Forsyth and credited to him the sum of $600 on account; that this was the only cause of action which he (Vehmeyer) had or claimed to have against Forsyth, at the time of the trial."

The court excluded all the evidence.

If Vehmeyer so testified (as both the witnesses would have sworn) and judgment was entered for Vehmeyer on that evidence, where he had so testified in his own behalf *in a court of record*, it is very strong evidence that the judgment entered was not for a debt *created* by the fraud of the defendant, and that the pleadings were not of such a character that no judgment could be rendered on them in favor of Vehmeyer and against Forsyth, except for a debt *created by the fraud of Forsyth.*

This is under the maxim above given, and from the view of the case as a judicial proceeding in a *court of record*, before the judge thereof. On the other view the circumstance that Vehmeyer, the plaintiff, testified that he had stopped the shipping of the wood to him, and that his claim against Forsyth was upon the items mentioned, is wholly inconsistent with the idea that at that trial he was prosecuting a claim which could not be proved at all without proving that it was created by the fraud of the defendant.

The other evidence offered and rejected is the written account and letters of Vehmeyer. They were all proved to have been prepared by Vehmeyer, and signed by him, and delivered by him to Forsyth April 3, 1869, and May 4, 1869. We have stated above what they prove.

This evidence is not subject to human ills or frailties. *The words and figures and their effect stand the same* as they stood thirty years ago, when they were written. There is no possibility of a mistake as to what they were then. No illusion, or prejudice or desire or confusion of events has varied the words or figures or sentences, or the idea which they conveyed when written.

They are the original words and figures and they are immutable; and they are therefore entirely reliable as to the facts they prove, while Mr. Frake's impressions on memory, left by forgotten words, and his translation of those impressions into what he regards as equivalent or nearly equivalent phrases, possess no such attributes.

That being the true state of affairs between the parties, Mr. Vehmeyer could not have got a judgment against Forsyth after the date of these papers for a debt incurred before their date, which was created by the fraud of the defendant.

The papers prove that Vehmeyer claimed grocery bills for the year ending in 1867 and interest thereon to May 1, 1869, at 6 per cent.; that all the money advanced or paid to Forsyth was advanced a year before the date alleged in the declaration supposed by Frake, and had all been paid before May 1, 1869, but $98.40; and that all the debt which Forsyth owed Vehmeyer at that date was made up of grocery bills and interest claims for commissions and interest, and that $98.40. Vehmeyer got judgment for his claims against Forsyth accrued anterior to the date of this bill, for $833, of which more than $700 dollars was for groceries and commissions and interest, and that judgment could not have been rendered for fraud or have proved that the debt involved was created by the fraud of the defendant, unless it was obtained by the fraud and perjury of the man who carefully compiled and signed and delivered those writings in April and May, 1869.

The proposition established by the courts of Illinois in this case is, that if any one can be found, with the temerity to swear, after a quarter of a century from the time he has seen a declaration once read by him, that he can and will give the substance and effect of the lost paper, and

that it declared that the debt sued on was created by fraud, the defendant is estopped and wholly powerless to produce any evidence to the contrary, unless he can produce another witness, who can testify that he read the lost paper, and that its substance and effect was as he states it.

Mr. Frake was a lawyer, but the asserted estoppel does not grow out of that, nor out of the fact that his name appeared as plaintiff's attorney in the old case, nor out of the fact that he brought the present action for the plaintiff as his attorney. If any other man, of whatever character or business, or want of business, had testified that he read the declaration filed in that case just once, a year prior to the trial, and that the lines he repeats are in effect and substance equivalent to that he read, the estoppel would be the same.

The facts proved and offered to be proved, by the defendant, are of a more certain and satisfactory character, than the translation of impressions supposed to be left by the impression once made on memory by words long since forgotten, and the court ought to have admitted the evidence.

In the testimony of Mr. Frake for plaintiff as to the substance (not a copy) of the declaration filed in 1870, he testified that it amounted to an allegation "that heretofore, to wit, on the 10th day of August, 1868," plaintiff advanced to defendant a sum of money also given under a *videlicet*.

There is no pretense or claim by plaintiff that Forsyth incurred any debt (fraudulently) after the date given in the supposed declaration.

What were the words of the declaration on which that suit went to trial no one can tell. Whether any part of the declaration was disclaimed or waived in open court, whether any amendment was made, or what the exact words were, do not appear. The plaintiff had a right to abandon any part of his claim, or to waive it.

Ayers v. *Kelly*, 11 Ill., 17.
Fitzgerald v. *Furgeson*, 25 Ill., 138.

All we can have, on either side of the case, is secondary evidence of its contents, or evidence tending to show that the secondary evidence of the contents is imperfect, mis-

taken or untrue; that it is inconsistent with what transpired at the trial and which must be presumed to be right (*omne praesumunter rite et solenniter esse acta donec probeter in contrariam*); or that it is inconsistent with the actual status of the parties, so that it is not natural that the plaintiff prosecuted in court to judgment a suit for $1,200 obtained by fraud in a lump sum on a day certain, when there was never any such transaction, and the only indebtedness was on a running account of small matters.

There are no degrees in secondary evidence. And any evidence tending to show what the cause of action actually was on which the verdict was taken, or that it was not the matter which Frake's testimony tended to show, was competent and should have been admitted.

The evidence Forsyth offered was the best of which the case was capable.

If Mr. Frake had testified to the contents of an indictment for embezzlement, could not Forsyth have testified —I was never tried for any crime. I never read the court papers, but I know I was not tried for a crime. Vehmeyer claimed I owed him on this written account he had rendered me, and I was tried on that claim, and he got judgment for the balance on that?

Forsyth's judgment on what passed around him in court is as good as Frake's judgment on what was the substance and real meat of a paper of which he cannot give a word, and which may have been amended or in part waived in open court (to avoid error in taking judgment). Or if Forsyth's judgment on such a matter is not as good as Frake's, there are no degrees in this secondary evidence from that cause, and the difference only goes to the credibility.

SIXTH.

In *Nauvoo* v. *Ritter*, 97 U. S., 389, it was held that "in Illinois a copy of a written instrument on which the action is founded must be filed with the declaration, and it constitutes part of the pleadings in the case." The statute referred to has been in force from long before 1845, and was in force in 1870 and 1871 as follows:

"If the plaintiff shall not file his declaration *together with a copy* of the instrument *or account* on which the action is brought, in case the same is brought on a written instrument or account, ten days before the court at which the summons or capias is made returnable, the court, on motion of the defendant, shall continue the cause. (Gross' Statutes, 510.)

In 1838 in *The People* v. *Pearson,* 1 Scam., 458, at page 462, the Supreme Court of Illinois said: "The object of the statute is *to apprize the defendant of the precise nature of the claim* which he is called upon to answer." The defendant, Forsyth, testified (Trans., 45, 46): "I remember for what I was sued in that case. I *know* for what I was sued in that case. I have that account with Vehmeyer, *which shows precisely what it was for.*" He was not cross-examined on this, but he produced the account in Vehmeyer's hand, and signed by him. He had a right to know, by the statute and that decision, from the account, what he was sued for; and with the account preserved, so clearly authenticated, the evidence is satisfactory. Frake's vague impressions are not satisfactory. The written account, made out by Vehmeyer, dated and signed by him, with Forsyth's testimony, and with Vehmeyer present to testify about his own act, was, under the statute and the decision quoted, the best evidence of which the case was capable; for the account attached to the declaration was placed therein conformity with the statute *to apprize Forsyth of the precise nature of the claim for which he was sued.*

People v. *Pearson,* 1 Scam., 458, p. 462.

EDWARD ROBY,
Counsel.

No. 648, 180

Term No. 1898.

Office Supreme Court U. S.
FILED
FEB 21 1899
JAMES H. McKENNEY,
Clerk.

Transcript of Record for U. S. Court of

UNITED STATES SUPREME COURT.

Filed Sept. Oct., 1899.

October Term, 1898.

JACOB SCHAEFFER,
Plaintiff in Error,

vs.

HENRY S. T. SCHMEYER,
Defendant in Error.

Error to the Supreme Court of Illinois.

Motion to Dismiss Writ of Error,

AND

BRIEF OF DEFENDANT IN ERROR.

JOHN S. MILLER,
Attorney for Defendant in Error.

M. W. ROBINSON,
Of Counsel.

CHICAGO

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1898.

Term No. 658.

JACOB FORSYTHE,
Plaintiff in Error,
vs.
HENRY F. T. VEHMEYER,
Defendant in Error.

Error to the Supreme Court of Illinois

MOTION TO DISMISS WRIT OF ERROR.

And now comes the defendant in error, Henry F. T. Vehmeyer, by his counsel, and moves the court to dismiss and annul the writ of error issued in the above entitled cause, and to dismiss the suit in error out of this court, because the decision of said cause in the Supreme Court of Illinois involved no Federal question, and the record of said cause discloses no question over which this court will take jurisdiction.

JOHN S. MILLER,
Attorney for Defendant in Error.

Brief.

This suit, in the trial court, was an action of debt upon a judgment alleged to have been rendered in the Superior Court of Cook County, Illinois, July 29, 1871, in favor of plaintiff Vehmeyer, against defendant Forsythe.

Pleas, 1st, *nul tiel record*, on which issue was joined; 2d, defendant's discharge in bankruptcy, in December, 1880. To this plea plaintiff replied in substance that the action, in which the judgment sued on was rendered, was brought to recover damages suffered by plaintiff, by reason of fraud, consisting of false representations of the defendant, on which plaintiff was induced to rely; and that such original action and the judgment recovered therein were founded solely upon said fraud of defendant, and the judgment therefore not discharged by defendant's discharge in bankruptcy.

Defendant by rejoinder traversed the material allegations of plaintiff's said replication; and thus issue was joined on the facts set up in plaintiff's replication, the law of the plaintiff's contention not being disputed.

The trial court found the issues for plaintiff and gave judgment June, 1897, for the amount of the original judgment sued on, with interest thereon.

Upon appeal to the Appellate Court of Illinois, First District, the judgment of the trial court (modified to correct a confessed clerical error in the amount found as damages) was affirmed. And all the questions of fact raised by the issues and evidence in the cause were fully presented, discussed and considered in the Appellate Court and by that court decided in favor of the plaintiff, appellee, Vehmeyer. This appears in the opinion of the Appellate Court, by Adams, Presiding Justice, which is incorporated in the record in this case.

Upon further appeal by defendant Forsythe from the judgment of the Appellate Court to the Supreme Court of Illi-

nois, the judgment of the Appellate Court was affirmed and the opinion of the Appellate Court is set forth in full and adopted as the opinion of the Supreme Court.

Under the laws of Illinois the Supreme Court accepts as final the findings of the Appellate Courts upon all questions of fact. In this case the Supreme Court have expressly concurred in and adopted the findings and conclusions of the Appellate Court as to all questions of fact involved. So that there can be no question concerning what the Supreme Court of Illinois holds to be the facts found in the case.

It is apparent on the face of this record that no question of law raising any Federal question was decided in this case; and that the decision of the Supreme Court of Illinois adverse to the defendant was solely upon questions of fact.

The validity of the Bankrupt Act of 1867 was not denied. The right of defendant, by virtue of having been discharged under that law, to all protection and immunity given by that law was not questioned. The law itself provides (Bankrupt Act of 1867, U. S. Rev. Statutes, Sec. 5116) that "No debt created by the fraud or embezzlement of the bankrupt * * * shall be discharged by proceedings in bankruptcy," etc. The only question raised in the case relating to the statute of the United States was whether or not the claim sued on was based upon the fraud of the defendant. This was purely a question of fact, put at issue by the pleadings, and to be determined upon the evidence in the case. Notwithstanding the claim was reduced to judgment, the record of such judgment may be looked into, and if it shows a material and traversable allegation of fraud as its sole foundation the debt is founded in fraud, and from it the bankrupt's discharge will not release him.

Warner v. *Cronkhite*, 6 Bissell, 453.

This question of fact was to be determined by the evidence contained in the record of the original judgment sued on in this case, or by the testimony as to what that record contained.

The Supreme Court of Illinois, in the opinion adopted by them in the case, decide as follows:

"Whether the judgment sued on was for fraud is a question to be determined from the record. (*Flanagan* v. *Pearson*, 14 National Bankruptcy Register, p. 37, 42 Tex. 1.) We think it clear that the judgment in question was recovered for the fraud of appellant, and that his discharge in bankruptcy did not discharge him therefrom." A few paragraphs further on they say: "There was only one count in the declaration" (in the original suit), "and it was held in the last case that whether the judgment was recovered for fraud is not a question for the jury but must be determined from the record. The suit having been in *case* for fraud and the declaration having been framed accordingly the judgment is conclusive as to the fraud, and the fraud is not, as contended by appellant's counsel, merged in the judgment."

This court has uniformly held in a large number of cases that it has not jurisdiction to review, upon writ of error, the decision of a State court upon a question of fact.

Bartlett et al. v. *Lockwood et al.*, 160 U. S. 357.
R. Bridge Co. v. *Kansas P. R. Co.*, 92 U. S. 315.
Martin v. *Marks*, 97 U. S. 345.
Kenney v. *Effinger*, 115 U. S. 577.
Quimby v. *Boyd*, 128 U. S. 488.

"It is likewise settled that the opinion of the Supreme Court * * * is a part of the record, and that it may be examined in order to ascertain the questions presented."

Egan et al. v. *Hart et al.*, 165 U. S. 188.

In *Dower* v. *Richards*, 151 U. S. 658, it is said: "That this court, in an action at law at least, has no jurisdiction to review the decision of a State court upon a pure question of fact, although a Federal question would or would not be presented according to the way in which the question of fact was decided, is clearly settled by a series of late decisions," etc., citing numerous cases.

We respectfully submit that there is no question presented by this record which this court, under a writ of error, will exercise jurisdiction to review. We deem it unnecessary to call the attention of the court to the further fact. manifest in this record, that in the decision of this case the Supreme Court of Illinois decided adversely to plaintiff in error upon several other points contended for by the appellant in that court, and which involved no reference to any alleged Federal question.

Defendant in error submits that the record in this cause discloses no ground for Federal jurisdiction, and that the writ of error in this cause was manifestly taken solely for purposes of delay. Wherefore the defendant in error, by his counsel, asks that damages be awarded him, at a rate not exceeding ten per cent, in addition to interest, and his costs in this behalf expended.

Respectfully submitted,

JOHN S. MILLER,
Attorney for Defendant in Error.

M. W. ROBINSON,
Of Counsel.

Supreme Court U. S.
FILED
MAY 8 1868
CHARLES ELMORE CROPLEY
CLERK

In the

Supreme Court of the United States.

REPLY BRIEF OF DEFENDANTS IN ERROR.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1898.

OLIVER O. FORSYTH, Administrator of the Estate of Jacob Forsyth, Deceased,
Plaintiff in Error,

vs.

HENRY F. T. VEHMEYER,
Defendant in Error.

Error to the Supreme Court of Illinois.

REPLY BRIEF OF DEFENDANT IN ERROR.

I. No Federal Question Involved.

The hearing of the motion made by the Defendant in Error to dismiss the writ of error in this case having been postponed by the court until this case should be reached in its regular order, counsel for the Defendant in Error, Henry F. T. Vehmeyer, respectfully submits his reply to the brief heretofore filed by the plaintiff in error.

The argument of the opposing counsel in the brief referred to is apparently based upon an erroneous hypothesis. It is to be remembered that this writ of error is

not prosecuted from a judgment of a state court which finds that the plaintiff in error was guilty of fraud which barred him from a discharge in bankruptcy. The action is one of *debt upon a judgment*, in a case in which no question of bankruptcy arose, and which judgment was never appealed from, and has never been attacked during its existence by the plaintiff in error. If that original judgment had been erroneous, and if the plaintiff in error was injured thereby, he had his legal remedy which could have been asserted at any time within five years after the date of that judgment. But this was never done, and, presumably, for good reasons.

The sufficiency of the evidence upon which that judgment was founded, the correctness and formality of the pleadings, and all other questions as to possible errors which may have been made in the original trial of that case are not subjects for consideration in this case. The plaintiff in error has been insisting upon the defendant in error re-trying that original case, ever since this suit upon the judgment in that original case was begun ; and the argument in his voluminous brief revolves about this erroneous idea. It would probably be impossible for the defendant in error after the lapse of these twenty-nine years to prove by witnesses his original cause of action. Certainly the law does not require of him any such proof.

It was only incumbent upon the defendant in error to prove upon the trial of this case that a judgment had been rendered against the plaintiff in error, in an action on the case for fraud and deceit; and incidentally that process of *ca. sa.* for his arrest issued upon the judgment in that case; and that the judgment had never been satisfied or annulled. An inspection of the transcript of record filed in

this case makes it manifest that the defendant in error proved all this by an abundance of evidence, and that the various appeals taken from that judgment have been upon mere technicalities, without one trace of merit, and for the purpose of wearing out the defendant in error and delaying justice.

This court would unquestionably have jurisdiction in this case if this were an original action against the plaintiff in error for a debt which was founded on fraud and claimed not to have been discharged by the Bankruptcy Act of 1867. In other words, if the plaintiff in error had set up discharge in bankruptcy as defense in the original suit, and had appealed from the *judgment in the original suit*, and had taken the cause finally before this tribunal, there would be no question of jurisdiction. But this is an action upon a judgment which has been found by five successive Illinois tribunals to have been rendered in July, 1871, against the plaintiff in error, for fraud and deceit in an action on the case. And we again submit that there is no Federal question involved in this case, but merely a question of fact which has long been decided—and properly.

In the case of *Newport Light Company* v. *Newport*, 151 U. S., 527, it is held that the Supreme Court of the United States must determine for itself whether the suit really involves any Federal question which will entitle it to review the judgment of the state court under United States Revised Statutes, section 709, although the state court certifies that such a question is involved.

If the decision of a Federal question by a state court is rendered unnecessary by the view which the court properly takes of the case within the scope of the pleadings, the

judgment is not open to review in the United States Supreme Court.

Chapman v. *Crane*, 123 U. S., 540.
Wells v. *Crane*, 150 U. S , 84.
Eustis v. *Bolles*, 150 U. S., 361.

It is submitted that this judgment of the Illinois Supreme Court was not based upon the fraud of the plaintiff in error, and did not involve that question. It decided merely that the trial court made no error in determining, from all the evidence before it, that the judgment which is the foundation of this suit had previously been rendered by the Superior Court of Cook County, Illinois, against the plaintiff in error in an action *ex delicto*, and remains in full force. If there had been an appeal or writ of error to this tribunal from that original judgment, the problem before this court would have been of a very different nature. But it is submitted that the Supreme Court of Illinois did not decide a Federal question when it sustained the finding of the trial court that the judgment of a certain kind had previously been rendered in the Superior Court of Cook County, Illinois. And if the Supreme Court of Illinois based its judgment upon this ground, even though it was erroneous, the United States Supreme Court will not take jurisdiction.

De Saussure v. *Gaillard*, 127 U. S., 216.

Here it might be well to call the attention of the court to the declaration in the original case, the contents of which are given in the testimony of the witness Frake and reproduced upon page 3 of the brief of plaintiff in error. [There is a slight misprint in the brief referred to. In the first line of the declaration the witness uses the word "plaintiff," and not "complainant," as there printed

in italics. See Trans. of Record, p. 27. Also in the sixth line from the bottom of said declaration, after the word "to" should be inserted the word "sell"; see Trans. of Record, p. 28.] The witness gave this declaration from memory, but testified that in the original he used the form books, Puterbaugh's Common Law Pleading and Chitty's Pleading. (Trans. of Record, p. 26.) He stated the substance of a good declaration, and one upon which a judgment in case could be founded; and the other testimony of the defendant in error, introduced at the trial (Trans. of Record, pp. 22-45), clearly established that such a judgment was rendered. The form of that original judgment, the subsequent proceedings, the arrest, etc., were questions of fact to be determined by the credibility of witnesses and all the circumstances in the case; and have been settled by the trial court and by the Illinois Appellate Court. The law in the case has never been in doubt, and all of these matters referred to above are *res adjudicata*.

In the case of *Clark* v. *U. S.*, 6 Wall., 254, it was held that a question of fraud or mistake is one of fact, upon which the finding of the court below is conclusive in this court.

The question of fraud in a court of law is a question of fact for the jury, under the instructions of the court.

Warner v. *Norton*. 20 How., 448.

Gregg v. *Sayre*, 8 Pet., 244.

Where the court below in an equity action, on a full consideration of all the proofs, came to a conclusion on a question of fraud, this court will concur with the court below, although the evidence raises some doubt.

Parker v. *Phetteplace*, 1 Wall., 684.

If the finding of facts by a jury, or by the court below, is conclusive in the State Supreme Court, the same will be held conclusive in the Supreme Court of the United States.

Republican River Bridge Co. v. *Kan. Pac. R. R. Co.*, 92 U. S., 316.

In order to bring this case within the purview of section 5117 of the Bankrupt Act, it is only required that the debt should be created by fraud.

Hinckley v. *Lewis*, 45 Ill., 327.
Mathews v. *Cowan*, 59 Ill., 342.

In the case of *Warner* v. *Norton*, 20 How., 448, in considering a question of fraud, the court say: "Few "questions in the law have given rise to a greater con- "flict of authority than the one under consideration. "But for many years past the tendency has been to con- "sider the question of fraud as a fact for the jury, "under the instructions of the court; and the weight of "authority seems to be now in this country favorable to "this position."

In the case of *Republican River Bridge Co.* v. *Kan. Pac. R. R. Co.*, 92 U. S., 315, which was referred to above, Mr. Justice MILLER says: "The finding by the "District Court was received by the Supreme Court of "the state (Kansas) as conclusive as to all facts in issue, "and it is equally conclusive upon us. * * * In "cases where the facts are submitted to a jury and "are passed upon by the verdict, in a common law ac- "tion, this court has the same inability to review those "facts in a case coming from a state court that it has in "a case coming from a Circuit Court of the United "States. This conclusiveness of facts found extends to

"the finding of a state court to whom they have been "submitted by waiving a jury, or to a referee, as well "as the verdict of a jury." Citing *Merad Mining Co.* v. *Boggs*, 3 Wall., 304, and *Crary* v. *Drolin*, 92 U. S., of the same term.

And although we recognize that this court would have jurisdiction in this case if this writ of error were prosecuted from an *original* action against the plaintiff in error, involving a question of discharge in bankruptcy, as before stated, we submit that an inspection of this record, including the opinion of the Illinois Supreme Court in this case, and the grounds upon which it based its judgment, will satisfy this court that under the peculiar facts of this case there is no Federal question involved, and that this writ of error should be dismissed for want of jurisdiction, or affirmed, in accordance with the motion of the defendant in error pending before the court.

* * *

II. Judgment of Ill. Supreme Court Right.

But if this court should be of the opinion that it has jurisdiction in the case, it is submitted that upon the merits of the suit the defendant in error is entitled to have the judgment below affirmed in this court, and that the judgment of the Illinois Supreme Court was in accordance with law and overwhelmingly sustained by the evidence.

The essential inquiry is whether or not any substantial and reversible errors of law were made by the Illinois courts; and whether the Bankrupt Act of 1867 ever intended to discharge a person from a judgment such as is here sued upon.

Erroneous Contentions.

In the court below one of the principal points contended for by plaintiff in error was, that oral evidence could not be admitted to establish the contents of a lost or destroyed record of judgment, but that the record of such judgment must first be restored in the manner provided by statute. The Appellate Court of Illinois and the Illinois Supreme Court have decided, in accordance with the settled law on that subject, that parol evidence is competent for that purpose. (See opinion in this case, Trans. of Record, pages 91–96.)

Another principal contention in the courts below, and in this court, was for the right of plaintiff in error to try over again, upon new evidence, the facts in controversy in the original case, in which the judgment sued on was rendered, for the purpose of seeking to prove that there was no fraud on the part of the defendant in the

transaction in controversy in the original suit. The Illinois Supreme Court has, in a few words, conclusively decided against that contention. Counsel for plaintiff in error, who were not connected with the former trial or appeal, in utter disregard of the opinion of the Illinois Appellate Court (55 Ill. App. Court R., 223), sought to again introduce such evidence on the second trial; and are here vigorously making the same contention on that point. It will be a sufficient answer to much of what is contended for in plaintiff in error's brief to refer to the decision already rendered in this case.

Issues in the Case.

The issues made by the pleadings in this case present two clear and simple questions: First, was there such judgment rendered by the Superior Court of Cook County, July 29, 1871, as the plaintiff alleges; and, secondly, was the plaintiff's recovery therein upon such a cause of action that the defendant, Forsyth, was not discharged from that indebtedness by his subsequent discharge in bankruptcy? The plaintiff below maintained the affirmative of both those issues by proof so conclusive in this record as to admit of no serious question.

Proof of the Judgment Conclusive.

The fact that there was such a judgment rendered as is alleged, and the essential contents of the lost record thereof and of the files therein were fully proven by competent evidence. The law is well settled that when it is proved or conceded that the record of the judgment sued on is lost, secondary parol evidence of the former exist-

ence and contents of the judgment record will be admitted. It is so held in the former decision of this case.

Forsyth v. *Vehmeyer*, 55 Ill. App., 223.

See, also,

13 Am. & Eng. Encycl. of Law (Topic, Lost Papers), p. 1156.

Freeman on Judgments, §§ 407 and 432b.

Abbot's Trial Evidence, p. 538.

Ashley v. *Johnson*, 74 Ill., 392.

Mandeville v. *Reynolds*, 68 N. Y., 528-538.

Renner v. *P. D. & Co. Bank of Col.*, 9 Wheaton, 581.

The statutory method of restoring such records does not exclude such proofs.

Mobley v. *Watts*, 98 N. C., 284.

Clifton v. *Fort*, 98 N. C., 173.

The secondary evidence offered by defendant in error in this record was competent and conclusive proof of all his allegations in relation to the judgment record in question. The testimony of Mr. Frake shows a clearly remembered and accurate personal knowledge of everything that occurred in the original suit from its commencement, and of the substantial contents of the record. His entries in his office docket, made at the time of the proceedings, bear out his recollection. He had examined the entry of the judgment in the judgment record carefully with the clerk of the court when he applied for a writ of *ca. sa.* for the purpose of arresting the defendant; and he gives its substantial contents, as well as the substance of the verdict. The testimony of this witness alone was complete proof

of plaintiff's allegations in issue in this suit, in the absence of any countervailing testimony. (Trans. of Record, pp. 22–33.)

But for greater certainty, defendant in error also introduced an abstract of the judgment record in question from the books of Chase Bros. & Co.—an abstract made in the course of their business of compilers of abstracts of title, which are legal evidence of the matters so shown. Mr. Stevens establishes the verity of that abstract by his testimony that he personally made the abstract and obtained the contents of it by personal examination of the files, minutes, orders and records of the court, his entries being verified by subsequent comparison with the written record. (See Trans. of Record, p. 34, and testimony of Stevens, pp. 33–43.)

The plaintiff in error also contributes to the evidence another abstract of the judgment record according to the abstract books of Shortall & Hoard, inserted at page 39 in transcript of record. While this was intended to raise some doubt as to the form of the action, it fully corroborates the proof that there was, and in legal contemplation still is, of record in the Superior Court of Cook County, Ill., such judgment as is alleged in plaintiff's declaration.

Counsel for plaintiff in error contends at great length that the declaration in the original suit, as testified about by the witness James Frake, lacked the *scienter* averment and was otherwise technically defective as a declaration in an action for fraud and deceit. And this is urged as part of his contention that plaintiff below failed to make proper proof of the judgment record sued on. This evidence was not offered by plaintiff as part of his proof of

the record of the judgment sued on, but upon the issue that the judgment was for such fraud of the defendant, that the judgment was not affected by discharge in bankruptcy. The proof was intended to show, and did show in substance, that the issues in the original case presented a material allegation of actual fraud as the foundation of the suit in which the judgment was obtained. The evidence did not pretend to furnish the exact language or formal parts of the declaration.

Counsel vigorously assails the supposed defects in the declaration in that original case, and argues that the judgment which was recovered could not or should not have been had upon such a declaration. But that contention, if of any value, should have been made in that case. It comes too late here. Counsel's supposed grounds of demurrer to that declaration, or of motion in arrest of that judgment, or assignment of errors to that judgment, will not be considered in this case. All those matters are *res adjudicata*. The verdict and judgment in that original case cured all such defects as counsel claims were in plaintiff's declaration therein, if any existed.

When there is any defect, imperfection or omission in any pleading, whether in *substance* or *form*, which would have been a fatal objection upon demurrer, yet if the issue joined required on the trial proof of the facts so defectively stated or omitted, and without which it is not to be presumed the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict.

Keegan v. *Kinnare*, 123 Ill., 280, 292.
1 Chitty's Pleadings (7th Ed.), pp. 711, 712.

If no motion is made in arrest of judgment, Sec. 6 of Revised Statutes of Illinois, on Amendments and Jeofails, prevents a reversal for any mispleading, insufficient pleading, etc.

Barnes v. *Brookman*, 107 Ill., 317-321.

THE DISCHARGE IN BANKRUPTCY NO BAR.

The remaining contention of plaintiff in error is his alleged discharge in bankruptcy, pleaded in bar of the judgment debt; to which defendant in error replies and makes proof that the judgment was based on the fraud of pefendant, and the debt was for that reason not barred by discharge in bankruptcy.

Discharge in bankruptcy as a defense is not meritorious, but *stricti juris*. The bankruptcy law was intended as a relief for *honest* debtors only. As a condition precedent to the discharge, the fullest truthfulness, honesty and good faith was required of the applicant in disclosing and surrendering all his assets, and in scheduling only his just liabilities, so that all his property might be fairly applied upon payment of all his honest debts. And the law rigidly prohibited him from obtaining discharge from any liability created by his fraudulent conduct in overreaching his fellow-man by deceit, falsehood or sharp practice.

The bankruptcy law, under which appellant sought shelter, does not discharge the bankrupt from a debt created by fraud.

U. S. Bankruptcy Act, Section 5116.
Bump on Bankruptcy, 741.

While it is true that judgments are among the class of debts provable and dischargeable in bankruptcy, the mere reducing such a claim to judgment does not convert it into a dischargeable debt. The record may be looked into, and if it shows a material and traversable allegation of fraud as its sole foundation, the debt may be fairly said to be founded on fraud, and from it the bankrupt's discharge will not release him.

Although the original ground of action may have originated in a contract undertaking, and the plaintiff might have elected to waive the tort and base his claim on the contract, he was not bound to do so. And when, as in this case, the debt was contracted by means of fraudulent representations of the seller, which were relied on by the purchaser and induced the sale, the injured party may sue in tort to recover his damages occasioned by the fraud and deceit in the transaction, and thus secure a more effective process for the enforcement of his recovery; and to such a recovery a discharge in bankruptcy will not be a bar.

Bump on Bankruptcy, pp. 742, 743, 753.
Eden on Bankruptcy, 110.
Horner v. *Spellman*, 78 Ill., 206.
Warner v. *Cronkhite*, 6 Bissell, 453, which is

particularly cited as presenting a clear statement of the law and review of the authorities on the question.

See, also,

Reid v. *Martin*, 11 N. Y. (S. C.), 590.
Hughes v. *Oliver*, 8 Penn. St., 426.
Field v. *Berlitzheimer*, 9 Bradwell, 465.
First National Bank v. *Burket*, 101 Ill., 392.

The contention of counsel for plaintiff in error that the "fraud" contemplated in the bankruptcy law means actual, positive fraud, involving moral turpitude or intentional wrong, is fully conceded; and the declarations of law to that effect proposed by him on the trial below were all given by the court. (See Transcript of Record, pp. 80-81.)

The finding of the court upon the evidence was entirely consistent with those declarations of law.

Appellant, on the trial below made, and in this appeal persists in, the futile contention that the facts relating to the original cause of action and in controversy in that case should have been retried in this suit upon such amended testimony as the defendant may now muster up. Appellant sought on the trial below, just as had been attempted on the first trial of this case, to open up the merits of the original controversy, and to show that the original recovery, in an action on the case for fraud and deceit, was not right and not sustained by the facts in the case as he now offers to prove the facts to be. The exclusion of this evidence is insisted on by appellant as error.

The evidence so offered was properly excluded. It is so expressly decided in this case, as reported in 55 Ill. App., 223; and no other authority need be cited. The merits of the original controversy, upon the facts as well as the law involved, are conclusively and finally settled by the judgment therein; and whether the finding in that case was right or wrong, the facts could not be tried over again in this case; and that judgment cannot be reviewed in this court. If any error was made which worked injustice to plaintiff in error in that case, he had his remedy by appeal or writ of error. But as he did not see fit to

pursue such remedy it is too late to seek in any court to avoid the effect of that finding and judgment.

The question in this case as to the form of action and the matters which were in controversy and determined by the judgment in the original case, *can only be tried by the record in that case;* and it must be decided by the proof of what that record was. Evidence *aliunde* cannot be considered The settled rule, as stated in *Warner* v. *Cronkhite*, is that if "the record of the action shows a material and traversable allegation of fraud as the sole foundation of the action, the debt or demand may fairly be said to be one founded in fraud, and the action to be one founded upon a debt or claim from which the bankrupt's discharge will not release him."

See, also, 20 Am. and Eng. Encyclop. of Law (Topic, "Record"), p. 499, note 1, and cases cited.

The proof in this case as to what the original record disclosed upon that point is all one way. The evidence on the part of the plaintiff is uncontroverted that the original action was in form *ex delicto*, based on the fraud and deceit of defendant; that the declaration, containing but one count, avers in substance, as the sole ground of the action, that defendant made to the plaintiff certain false and fraudulent representations as to existing facts which are set forth; that the alleged false representations were made for the purpose of inducing plaintiff to advance to defendant a large sum of money, as stated; that the plaintiff, relying on those false representations, was so induced to advance, and did advance to defendant, the alleged sum of money; that the alleged representations as to the existing facts (about defendant owning or having 200 cords of

wood ready to be shipped to Eldridge under his contract with Eldridge) were false when made, and no such pretended arrangement with Eldridge existed or was ever carried out; and that defendant, by such false representations and deceit, defrauded plaintiff of the money he was so induced to advance defendant, and thereby damaged him to the amount laid in the declaration.

The evidence shows that defendant joined issue upon those averments in a plea of not guilty; that the case was tried upon evidence offered upon that sole issue, and a verdict rendered finding the defendant guilty on the issue joined, and assessing plaintiff's damages at $833.35; upon which the judgment here sued on was subsequently rendered by the court, and duly entered in the judgment record. This is all conclusively shown in substance by the testimony of Mr. Frake. Notwithstanding the frantic effort of defendant's counsel on the trial to confuse the witness by interruptions and objections, his clear recollection of the case leaves no doubt that the material averments in issue in the original suit, and its sole foundation, were the allegations of the fraud and deceit of the defendant. (See Trans. of Record, pp. 22-33.) It is manifest that no judgment at all was recoverable in that action except upon the issue of fraud.

Further proof from the record in the original case, that the issue was the fraud of defendant, is furnished by the admitted fact that a writ of *capias ad satisfaciendum* was afterwards issued upon that judgment and the defendant arrested thereon by the sheriff and committed about October, 1871. The judgment upon the cause of action stated, and about which both parties agree, must necessarily have been in an action *ex delicto*, for fraud and deceit; other-

wise that writ could not have issued. If the recovery was in assumpsit, upon contract liability, there could have been no arrest of defendant under a *ca. sa.*

The offer by plaintiff in error of evidence to the effect that defendant was discharged from arrest in the original action by the County Court, upon making schedule under the insolvent debtor's act, was properly excluded by the court below as incompetent and not admissible under the pleadings. The ruling is held to be good in the opinion in this case, cited in 55 Ill. App., 223. The more reliable testimony as to those proceedings in the County Court, introduced by defendant in error without objection, shows that an application was made to the County Court by the defendant Forsyth, after his arrest, to be discharged as an insolvent under the Illinois Insolvent Debtor's Act, and pending that application the case was continued, and the defendant released on bail with leave to present a schedule at the next hearing and to establish if he could his right to be discharged. The great fire destroyed all records before the time set for that adjourned hearing, and the schedule was never presented. (See Trans. of Rec., p. 77.)

The additional plea filed by appellant, and to which a demurrer was sustained, presented an immaterial double issue which was good neither as a plea in bar nor in avoidance. It was wholly immaterial to this case whether the County Court discharged Forsyth from arrest or not. If he had been so discharged, that would not have satisfied or discharged or in any way affected the original judgment. The decree or order of the County Court surely cannot have the effect to reverse or annul the judgment of the Superior Court, or change the issues or

the findings in that court, as seems to be set up in the rejected plea.

Further corroboration of the proof from the record, that the issues in the original suit were those of an action *ex delicto*, is furnished by the abstract of the judgment record in question, taken from the books of Chase Bros. & Co., and the testimony of Mr. Stevens as to the sources from which that abstract was compiled. (Trans. of Rec., pp. 33-43.) This evidence is very convincing proof that the original action in question was an action on the case. Mr. Stevens personally examined the *præcipe* and pleadings in the case as they were filed. And that the suit was in form *ex delicto* was known from his personal inspection of the papers, and he was not likely to be mistaken. The other abstract from the books of Shortall & Hoard, which was offered by appellant to raise doubt as to the form of the action, has comparatively but little weight as evidence. It is not shown from what sources the contents of that abstract, as relates to the form of the action, were taken; nor whether it was derived from the files in the case or correctly represents the contents of the files. (See testimony of Marshall Waite, Trans. of Rec., pp. 72, 76.)

This bit of testimony is the only evidence in this case, on the part of plaintiff in error, that is opposed to the complete and conclusive proof on the part of defendant in error, making it manifest by the record in the original case that the gist of that action, and the sole foundation for recovery therein, was the allegation of actual fraud on the part of plaintiff in error, as claimed in our replication. And we submit that the finding upon that issue is sustained by this record.

This case discloses neither a meritorious nor technical defense to a just indebtedness, and the evidence taken as a whole establishes a judgment from which the Bankruptcy Act was never intended to discharge the debtor.

We respectfully submit that the judgment of the Illinois Supreme Court should be affirmed.

JOHN S. MILLER,
Attorney for Defendant in Error.

M. W. ROBINSON,
Of Counsel.

FORSYTH *v.* VEHMEYER.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 180. Submitted March 13, 1900.—Decided April 9, 1900.

A representation as to a fact, made knowingly, falsely and fraudulently, for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of a fraud involving moral turpitude and intentional wrong, and such debt is not discharged by a discharge in bankruptcy.

THIS was a motion to dismiss. The case is stated in the opinion of the court.

Mr. John S. Miller and *Mr. M. W. Robinson* for the motion.

Mr. Edward Roby opposing.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The defendant in error brought this action against one Jacob Forsyth, in the Superior Court of Cook County, in the State of

Illinois, in April term, 1891, upon a judgment in his favor which he had theretofore recovered against the said Jacob Forsyth. The defendant has died since the commencement of this action, and the plaintiff in error has been appointed administrator upon his estate. The judgment sued upon was entered at the June term of the Superior Court of Cook County, in the State of Illinois, held in Chicago in 1871, and the judgment record was destroyed by the great fire in that city on October 9, 1871.

To the declaration in the action upon this judgment the defendant pleaded (1) *nil debet;* (2) *nul tiel record;* (3) a discharge in bankruptcy, (meaning under the bankrupt act of 1867).

Plaintiff replied to the third plea, that the debt mentioned in the judgment was created by fraud, and therefore was not discharged under the bankrupt act.

Upon the trial the plaintiff, in order to prove the original judgment and its character, called as a witness the attorney who procured it, who testified that the declaration was in substance as follows: The plaintiff complains of the defendant in an action in trespass on the case, for that on the tenth day of August, 1868, in order to induce the plaintiff to advance to the defendant a large amount of money, to wit, the sum of twelve hundred dollars, the defendant falsely and fraudulently represented unto the plaintiff that the defendant had a large amount of birch cordwood, to wit, the amount of 200 cords, cut and piled up near the Pittsburgh and Fort Wayne Railroad in the county of Lake, State of Indiana, ready to be shipped to Chicago; that one Eldridge had contracted to purchase the wood at six dollars per cord in the city of Chicago, when shipped, and that if the plaintiff would advance to the defendant at the rate of five dollars per cord, for the two hundred cords of wood, the defendant would immediately ship the cordwood to the city of Chicago; that the plaintiff relying upon those representations as being true advanced to the defendant the sum of $1200; that the defendant shipped only the sum of forty cords of wood to Eldridge, upon which the plaintiff received the sum of six dollars per cord; that the representations of the defendant were false and fraudulent; that he did not have and never did have in the county of Lake and State of Indiana two hundred cords of birch

wood piled up ready for shipment to the city of Chicago to sell to Eldridge, but that he only had in the county of Lake, or anywhere else, the sum of forty cords of birch wood, which was shipped by the defendant to Eldridge; that the plaintiff was damaged to the extent of the amount that was alleged in the declaration, and therefore he brings this action for fraud and deceit against the defendant.

To this declaration the undisputed evidence shows that the defendant pleaded not guilty, and there was no other issue in the case. The verdict was, "That the jury found the defendant guilty and assessed the plaintiff's damages at $833.35." Judgment was duly entered upon the verdict, and it is this judgment which is sued upon in this action.

The present action was tried before the court, and upon the trial the defendant read in evidence a duly certified copy of his discharge in bankruptcy on December 30, 1880. The court found the issues in favor of the plaintiff, and ordered judgment in his favor, which was duly entered. Upon appeal to the Appellate Court the judgment was affirmed, and upon a further appeal to the Supreme Court that court also affirmed it, and the case is now here on writ of error to the Supreme Court of Illinois.

Unless the judgment sued upon was recovered on a debt created by fraud, the defendant's discharge in bankruptcy was a bar to the maintenance of this action.

The bankrupt act of 1867, section 33, 14 Stat. 517, 533; also Rev. Stat. section 5117, provided, "That no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act," etc.

The plaintiff in error contends that the original judgment was not recovered in an action for fraud and deceit, and even if it were, the fraud proved is not that kind of fraud which is debarred from a discharge in bankruptcy. He gave some evidence tending to show that the action was in the nature of one in assumpsit, but the finding of the court in plaintiff's favor must be held to be a finding that the action was for fraud.

The declaration proved alleges a false and fraudulent rep-

resentation by means of which the plaintiff below was induced to advance money to the defendant to his damage in a named amount. The defendant pleaded not guilty, and if the cause of action had been one in assumpsit, the plea at common law would have been non-assumpsit instead of not guilty. 3 Ch. Pl. 10th Am. 3d Lond. ed. pp. 908, 1030.

The declaration did not, it is true, contain the allegation that the representations of the defendant were false to his knowledge. It simply said that the representations of the defendant were false and fraudulent.

The opinion of the Appellate Court, in this case, which was adopted by the Supreme Court of the State, held that "the declaration testified to is too plainly in tort for false and fraudulent representations to require argument. The allegation that the representations were false and fraudulent implies that appellant knew of their falsity. . . . But even though an express allegation of the *scienter* were necessary, its omission would be cured by the verdict." We understand by this opinion that the court held the first action was for fraud and deceit and that the plaintiff was bound to have proved the fraud as alleged in the declaration in order to maintain the action. This decision involves no Federal question.

Where the state court has decided that the action was for fraud and deceit, and has held that in order to have maintained such action the fraud must have been proved as laid in the declaration, it must be assumed that the verdict and judgment in that action were obtained only upon proof and a finding by the jury of the fact of fraud. Judgment being entered after a trial upon such pleadings and upon a verdict of guilty, the question of fraud was not open for a second litigation upon the trial of this action. The defendant below in this action had full opportunity given him to prove what in fact was the declaration in and the character of the first action, and the findings of the court below in favor of the plaintiff must be regarded as a finding against the defendant upon the issue as to the character of that action. The evidence offered by him and rejected by the court was not admissible on the issue because it was not pertinent. The existence of the fraud must, therefore, be assumed in the

further progress of the case. The only matter left for this court to decide is whether a debt created by means of a fraud, such as is set forth in the declaration, is exempt from the effect of a discharge in bankruptcy.

The proper construction of the section of the act relating to such a discharge has been frequently before this court, and we regard the law upon the subject as quite well settled. There are many cases where it has been claimed that the discharge was operative, if the fraud proved was only constructive, and involved no moral turpitude or intentional wrong. Such cases are illustrated by that of *Hennequin* v. *Clews*, 111 U. S. 676. In that case the pledgee of stocks, held as security for a liability incurred by him for the pledgor, had thereafter hypothecated the stocks to secure a debt due from himself to another, and having failed to return to his pledgor such stocks when his liability for the pledgor had ceased, it was held that he was not thereby guilty of a fraudulent creation of his debt to the pledgor, and that it had not been incurred in a fiduciary capacity, so as to bar his discharge under the thirty-third section of the bankrupt act. Many of the cases bearing upon the subject are cited by Mr. Justice Bradley, who delivered the opinion of the court, and it is unnecessary to comment upon them here. He referred to the case of *Neal* v. *Clark*, 95 U. S. 704, where Mr. Justice Harlan, in delivering the opinion of the court, said: "Such association justifies, if it does not imperatively require, the conclusion that the 'fraud' referred to in that section (33) means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality. Such a construction of the statute is consonant with equity, and consistent with the object and intention of Congress in enacting a general law by which the honest citizen may be relieved from the burden of hopeless insolvency. A different construction would be inconsistent with the liberal spirit which pervades the entire bankrupt system."

The *Hennequin case* was held to be governed by the principle announced in the case of *Neal* v. *Clark*, and the discharge was held effective.

In *Strang* v. *Bradner*, 114 U. S. 555, the rule as to the kind of fraud intended to be exempted from discharge by the bankrupt act was again adverted to, and it was again said that it was positive fraud or fraud in fact, involving moral turpitude or intentional wrong; not implied fraud which may exist without bad faith. In that case certain false and fraudulent misrepresentations of fact were made by one member of a partnership firm, by reason of which the debt was created, and it was held that it was a debt of that character which was not discharged under the bankrupt act, and the innocent members of the firm were liable upon the debt created by the fraudulent misrepresentations of another member of the firm.

Also in *Ames* v. *Moir*, 138 U. S. 306, 312, it was said: "If Ames made his call, with the knowledge that he was insolvent, and with the purpose of getting possession of the wines and shipping them out of the State without paying for them according to the terms of the executory agreement of June 9, and received them with that preconceived intent — and there was evidence that justified the jury in so finding — he was guilty of fraud in fact, involving moral turpitude or intentional wrong, and is not protected against the claim of the plaintiffs by his discharge in bankruptcy."

Within this rule, as maintained by the court, there can be no doubt that the defendant below was not discharged under the bankrupt act. A representation as to a fact, made knowingly, falsely and fraudulently for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of a fraud involving moral turpitude and intentional wrong. It is not necessary to enlarge upon the subject. It is so plainly a fraud of that description that its mere statement obtains our ready assent.

The courts below were, therefore, right in denying to the defendant any benefit by reason of his discharge in bankruptcy. The judgment of the Supreme Court of the State of Illinois is right, and must, therefore, be

Affirmed.